EXHIBIT 2

Transcript of August 30, 2024 Hearing in *In re Bed Bath & Beyond, Inc.*, Case No. 23-13359 (VFP) (Bankr. D.N.J.), filed as Exhibit A to *Burlington Stores, Inc.'s Omnibus Reply to Objections to Burlington's Assignment and Assumption of Myrtle Beach, SC, Washington, UT, Bellevue, NE, Flagstaff, AZ, and Fayetteville, AR Leases*

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY

IN RE:	.	Case No. 23-13359-VFP
	.	
BED BATH & BEYOND, INC.,	.	M.L.K. Federal Building
et al.,	.	50 Walnut Street, 3rd Floor
	.	Newark, NJ 07102
Debtors.	.	
	.	August 30, 2023
. . . . .	.	10:09 a.m.

TRANSCRIPT OF SALE HEARING WITH RESPECT TO PHASE I LEASES
BEFORE HONORABLE VINCENT F. PAPALIA
UNITED STATES BANKRUPTCY COURT JUDGE

APPEARANCES:

For the Debtors: Kirkland & Ellis LLP
By: ROSS J. FIEDLER, ESQ.
EMILY E. GEIER, P.C.
601 Lexington Avenue
New York, NY 10022

Kirkland & Ellis LLP
By: CASEY McGUSHIN, ESQ.
300 North LaSalle
Chicago, IL 60654

Kirkland & Ellis LLP
By: CHRISTINE SHANG, ESQ.
609 Main Street
Houston, TX 77002

Cole Schotz, P.C.
By: WARREN A. USATINE, ESQ.
Court Plaza North, 25 Main Street
Hackensack, New Jersey 07601

Audio Operator: Juan Filgueiras

Proceedings recorded by electronic sound recording, transcript produced by transcription service.

J&J COURT TRANSCRIBERS, INC.
268 Evergreen Avenue
Hamilton, New Jersey 08619
E-mail: jjcourt@jjcourt.com

(609) 586-2311 Fax No. (609) 587-3599

APPEARANCES (Cont'd):

For Pinnacle Hills, LLC:
Kelley Drye & Warren LLP
By: ROBERT L. LeHANE, ESQ.
CHRISTINE ISAACS, ESQ.
3 World Trade Center
175 Greenwich Street
New York, NY 10007

Kelley Drye & Warren LLP
By: WILLIAM S. GYVES, ESQ.
PHILIP A. WEINTRAUB, ESQ.
3 World Trade Center
175 Greenwich Street
New York, NY 10007

For Michaels Stores, Inc.:
Lowenstein Sandler, LLP
By: PHILIP J. GROSS, ESQ.
One Lowenstein Drive
Roseland, New Jersey 07068

Lowenstein Sandler, LLP
By: KENNETH A. ROSEN, ESQ.
1251 Avenue of the Americas
New York, NY 10020

For DPEG Fountains, LP:
Porzio, Bromberg & Newman, P.C.
By: JOHN S. MAIRO, ESQ.
100 Southgate Parkway
P.O. Box 1997
Morristown, NJ 07962

Porzio, Bromberg & Newman, P.C.
BY: DEAN M. OSWALD, ESQ.
1675 Broadway, Suite 1810
New York, NY 10019

For Michaels Stores, Inc.:
White & Case, LLP
By: SAMUEL P. HERSHEY, ESQ.
1221 Avenue of the Americas
New York, New York 10020

White & Case, LLP
By: LAURA E. BACCASH, ESQ.
111 South Wacker Drive, Suite 5100
Chicago, IL 60606-4302

APPEARANCES (Cont'd):

For Michaels Stores, Inc.	White & Case, LLP By: DEVIN RIVERO, ESQ. Southeast Financial Center 200 South Biscayne Blvd., Suite 4900 Miami, FL 33131-2352
For Burlington Coat Factory Warehouse Corporation:	Womble Bond Dickinson (US) LLP By: WOJCIECH F. JUNG, ESQ. 950 Third Avenue, Suite 2400 New York, NY 10022

- - -

(Proceedings commenced at 10:29 a.m.)

THE COURT: Okay. Good morning.

MR. FIEDLER: Good morning, Your Honor.

THE COURT: It is Wednesday, August 30th --

ELECTRONIC INTERRUPTION: Recording in progress.

THE COURT: Good morning, everyone. It is Wednesday, August 30, 2023. This is the United States Bankruptcy Court for the District of New Jersey, and we are here in the case of Bed Bath & Beyond, Inc., et al., 23-13359, and it's an evidentiary hearing with regard to the debtors' motion to assume and assign three leases, one at the Pinnacle Hill Shopping Center, Serramonte, and Fountains.

I know you filed an amended agenda last night, so why don't we get started and I have a couple of preliminary comments and then we can proceed.

MR. FIEDLER: Okay. Great, Your Honor. Good morning. Ross Fiedler of Kirkland and Ellis on behalf of the debtors. I'm joined by my partners, Emily Geier and Casey McGushin, along with my colleague, Christine Shang, and co-counsel, Warren Usatine, from Cole Schotz.

THE COURT: Okay. Good morning.

MR. FIEDLER: Your Honor, as you noted, we filed an amended agenda yesterday at Docket Number 2085. As you'll note, there was a rejection motion at Docket 1613, which we've resolved one of the objections, and we'll file an order for

Your Honor's consideration. We have adjourned that rejection motion solely as it relates to the remaining lease in Addison, Texas, to September 12th.

But with that, as Your Honor mentioned, we're here today on one key matter, that's the assignment of these three leases. I'm happy to proceed or if Your Honor wanted to make those preliminary comments. However Your Honor would like to proceed.

THE COURT: Well, I do have some preliminary comments and questions and they mostly relate to how we're going to proceed today. The first one is opening statements. I've read the papers. I have a good feel for what the facts and arguments are up to this point, certainly. And I'm fine with a very brief opening statement, and I'm also fine with dispensing with opening statements and also proceeding directly with, and this is going to fall into my second and third questions, the evidentiary presentation.

So do the parties wish to make opening statements? And that goes to the --

MR. FIEDLER: Yeah.

THE COURT: -- debtors and the landlords and whomever else is here to be heard.

MR. FIEDLER: Your Honor, I'd like to just make a few comments at the outset to set the stage for the key issues and facts. I think we can dispense with opening statements.

On the evidentiary point, which I was planning to make, why don't I just turn to that now. We do have basically a fully stipulated evidentiary record that consists of the leases, which, as Your Honor noted, is the Pinnacle Hills lease, the Serramonte lease, and the Fountains lease. Those are the debtors leases.

THE COURT: Right.

MR. FIEDLER: The other leases are the landlord leases with other third-party shopping center tenants. That's the Hobby Lobby lease, the Dollar Tree lease, and the two Ross Store leases. We also have testimony, which consists of the declarations and the deposition transcripts. As to the depositions of Mr. Amendola and Mr. Aronoff, the parties have agreed to certain excerpts to the deposition transcripts which were submitted to chambers last night via email by Mr. Usatine and Ms. Isaacs of Kelley Drye.

As to the declarations, those include the Amendola declaration from the debtors at Docket Number 2062; the Aronoff declaration and the Elliott declaration from Pinnacle Hills, filed at Docket Number 1927 and 28, respectively; the Bell declaration from Serramonte filed at Docket Number 1930; and finally, the Dhanani declaration from Fountains at Docket Number 1573.

With respect to Serramonte, we have filed the stipulation of facts at Docket Number 2087.

THE COURT: Oh, I didn't --

MR. FIEDLER: I don't know if Your Honor saw that.

THE COURT: That's what I was going to ask, because I thought there was going to be a stipulation of facts, and I didn't see it, so --

MR. FIEDLER: I have a copy if you'd like me to --

THE COURT: Yeah. I mean, obviously, since I didn't see it, I didn't read it, so I would need a moment to read that. Are you saying this applies only to the Serramonte lease, or?

MR. FIEDLER: That's right, only Serramonte. Although we do have another stipulation of facts, which I understand was just filed, and that's for the Fountains lease. So, apologies for getting that to Your Honor after the hearing started, but it took a little while to tie the bow on that.

THE COURT: And not as to the Pinnacle --

MR. FIEDLER: Pinnacle Hills, we've agreed to rely on the leases and the testimony, which includes the deposition transcript excerpts that were submitted to Your Honor, as well as the declarations. Well, certain of the declarations.

THE COURT: All right. So then, I guess that does --

MR. FIEDLER: So, unless Your Honor has any questions on the evidence, I would, given the agreement on the parties, ask that we submit those documents into evidence.

THE COURT: Yeah. Well, I'll ask if there are any

objections. But I do have that question first, is that it was my understanding that there was going to be some type of evidentiary hearing today with testimony. But as I understand what you're saying and Mr. Gyves' letter, although I wanted to just confirm it, is that it seems like you're saying there's no more testimony that's going to be needed and we're going to proceed on the record as you just outlined it.

MR. FIEDLER: That's correct, Your Honor.

THE COURT: So are we headed right to the closing argument? Is that where this is?

MR. FIEDLER: I can give Your Honor just a brief overview to set the stage. We do have three objections, but they're all very similar and they share a lot of commonalities, and I think we can address each lease objection individually, starting with Pinnacle Hills. Or if Your Honor would just like to go straight forward with all of them, we can proceed that way as well.

THE COURT: I'm not going to tell you how you present your case. You can present it in whichever way you believe is most appropriate. And also, same goes for the landlords. And to the extent there's any -- I don't think anyone else filed papers as far as I can tell, so I think that's really the scope of it.

And then, I just wanted to clarify one other thing. I did have one final question. The way this was presented to

me, at least initially, and I think almost all throughout except maybe towards the very end of the submissions, was that I was being asked to rule on whether the adequate assurance requirements of 365(b)(3)(C) and (D) were satisfied. And that's what this is all about.

There was some discussion of adequate assurance as to financial condition, but that seemed to have been addressed in the sense that the debtor said they'll provide whatever they need, whatever is requested reasonably. And I thought percentage rent might have slipped in there at the end, too, but it wasn't a focus of anything and I'm not sure there's really much evidence or kind of any evidence on that at at this point. So that was what I think is my last question.

MR. FIEDLER: Okay. Yeah. That's right, Your Honor. It's just 365(b)(3)(C) and (D), and I'll get to that in a moment. I think before we proceed, if it's all right with Your Honor, if we could just proceed with getting the evidence submitted and then we can go to a statement and argument after that.

THE COURT: Okay. So the landlord's heard Mr. Fiedler's presentation as to what the evidence is. And if there's any clarification or addition or whatever that needs to be made, then why don't we do that?

MR. FIEDLER: Your Honor, we also submitted three additional documents relating to the Pinnacle Hills Shopping

Center directory and stores that were emailed to your chambers. I have them here and we would like to add that to the evidentiary record as well. The landlord and Michaels are both aware of that as well.

THE COURT: This is different than the PowerPoint that was provided?

MR. FIEDLER: That's right. This is just an overview of the directory and map of the shopping center at Pinnacle Hills --

THE COURT: Okay.

MR. FIEDLER: -- and the stores therein.

THE COURT: And then, I thought -- I wasn't correct. I said it was my last question, but it wasn't really my last question because there also seems to have been, I want to use the right word, but I thought we were initially talking about the Pinnacle Hills Shopping Center, and then subsequently, the focus was with the whatever hundred-plus stores and subsequently, there was a lot of discussion of the power center, which is, as I understood it, is kind of a subset of the Pinnacle Hills Shopping Center. But the shopping center we were talking about and I thought that was agreed to was the Pinnacle Hills Shopping Center.

MR. FIEDLER: That is our understanding, Your Honor, and that is part of our argument, that we should be looking at the shopping center broadly and not the power center, which is

a subset of collection of stores within the broader shopping center. But, yes, we will certainly touch on that.

THE COURT: All right.

MR. FIEDLER: Okay, so --

THE COURT: Mr. LeHane. Yeah.

He wanted to comment. I invited other comments on your presentation. It sounded like you were done.

MR. LEHANE: Good morning, Your Honor. Robert Lehane, Kelley Drye and Warren, on behalf of Pinnacle Hills, the landlord at Rogers, Arkansas, and Daly City Serramonte Center, LLC, the landlord at the Serramonte Center in Daly City, California.

With me today are my partner, Bill Gyves, associate Philip Weintraub, and from Brookfield Properties, the owner of Pinnacle Hills, Jeffrey Aronoff is here in Court today, Your Honor.

THE COURT: Okay. Well, good morning and welcome.

MR. LEHANE: Thank you very much, Your Honor.

We know we've got a lot to get through this morning. We appreciate and I agree with Mr. Fiedler's recitation of what the agreements that we've reached with respect to the evidence that should be in the record. We do have an amendment or a supplement as well with respect to some of the deposition transcripts. We just want to add and supplement, there are some additional pages of Mr. Amendola's deposition excerpts,

which Mr. Gyves will point out. But other than that, we agree, but we would also, for the record, disagree about any agreement on what the relevant shopping center is. There's no agreement on that and that's subject of today's discussion, Your Honor.

Thank you.

THE COURT: All right.

So, you were going to tell me those read-ins from Amendola's deposition?

MR. GYVES: Good morning, Your Honor. Am I okay here or shall I get up there?

THE COURT: Well, I understand that it's better at the podium for recording purposes.

MR. GYVES: Easy enough.

Good morning, Your Honor.

THE COURT: Good morning.

MR. GYVES: Bill Gyves, Kelley Drye.

The only addition that we would propose and we've conferred with counsel for debtors and Michaels is, in our rush to get you deposition excerpts yesterday, I dropped one page and 14 lines from the Amendola deposition. So we would like to supplement our Exhibit 6 with Page 42 of the Amendola deposition, Lines 2 through 16.

THE COURT: Page 42, let me get there.

MR. GYVES: 4-2, Lines 2 through 16.

THE COURT: Did you say 42?

MR. GYVES: Page 42.

THE COURT: I don't have it.

MR. GYVES: That's what I have.

THE COURT: Okay. I was looking for it and I didn't see it.

MR. GYVES: That's what I should have gotten to you yesterday.

THE COURT: All right. Thank you.

MR. GYVES: And that's all we have on that, Your Honor. Thank you.

THE COURT: 9 through?

MR. GYVES: 2 through 1-6.

THE COURT: Okay.

MR. GYVES: All right. Thank you.

THE COURT: Got it. Thank you.

MR. HERSHEY: Good morning, Your Honor. Sam Hershey from White and Case for Michaels Stores. I'm joined by my colleagues Laura Baccash and Devin Rivero.

I just want to note for the avoidance of doubt that Michaels also was part of the conversations between the debtors and the landlord regarding how we will proceed today, and Michaels agrees with the agreement that was reached.

THE COURT: Of course.

MR. HERSHEY: Thank you.

MR. FIEDLER: Okay. Your Honor, with that, why don't

I proceed.

As I mentioned, we have three separate objections filed by three distinct landlords. These are leases that the debtors are seeking to assign. They're valuable leases. It's not disputed that they're under market, which is to say that Bed Bath currently rents these properties for less than the landlord could otherwise rent the property if the debtors were to reject the leases and return the property to the landlords.

And so, that's part of the reason why we have substantial bids from Michaels and Burlington to take these leases on. And I think it's easy to see why the objecting landlords do not want to see their properties assigned to the new tenants on the current lease terms.

Despite having had the opportunity to participate in the auction for these leases by putting forth competitive bids just like everyone else, the landlords opted not to. They're now looking to claw back their leases by other means. Specifically, as Your Honor noted, there are two really distinct, I'll say, novel legal arguments at play.

First is that the landlord --

THE COURT: Can I stop you, though, for one second? I don't want to interrupt your flow, but you said they did not bid at the auction of landlords. What significance do you want me to attach to that?

MR. FIEDLER: The significance, Your Honor, is they

had the opportunity to bid for an under market lease and get their lease back by the auction process that was established by the debtors. But in their decision, they opted not to, and now are trying to stand in the way of the lease assignments by mischaracterizing the law and not participating in the debtors' auction process. Also at --

THE COURT: But are you saying that they had some obligation to do that or --

MR. FIEDLER: Not necessarily, Your Honor, that they had an obligation, but we have Michaels and Burlington paying significant amounts for these leases, nearly $1.5 million, and we don't have a backup bidder. And so there's a lot of money at stake for the debtors' estate and its stakeholders in a case where, as you've seen, every dollar really matters.

But as I was mentioning, two distinct legal arguments. First, the landlords are arguing that the Bed Bath lease would violate, the lease assignment would violate 365(b)(3)(C) because it would breach an exclusive provision set forth in the landlord's lease, not with the debtors but with some other unaffiliated third party in the shopping center.

The second main argument the landlords make is that the proposed assignments to Michaels and to Burlington would disrupt the tenant mix and balance in the underlying shopping centers, purportedly in violation of 365(b)(3)(D) of the Bankruptcy Code. Your Honor, as you'll hear today from the

debtors, from Burlington, from Michaels, none of these objections can survive legal scrutiny, much less the evidence in the record before you.

So, overall, Your Honor, throughout these cases, the debtors have been really successful in monetizing the value of their leases and if the proposed assignments are approved, as I mentioned, there's nearly $1.5 million set to inure to the estate for the benefit of key stakeholders.

Let me just also say this, Your Honor, there have been hundreds of leased properties up for auction in these cases and issues have been raised by landlords with a number of the proposed lease sales. And that's evidenced by the jam-packed docket that Your Honor has seen. But valid objections have been filed and the debtors have exercised their discretion appropriately to address those objections. And so there's been a number of valid use restrictions in the debtors' leases where the debtors chose not to proceed with valuable lease sales.

But here is a little different, Your Honor. The debtors can't sit back and abide by any land grabs by the landlords to recapture their under market leases, not only as a result of not participating in the auction, but in characterizing the law it fundamentally at odds with the existing authority. So, that's just a flavor of the issues, Your Honor. I'm happy to just turn to argument now on the Pinnacle Hills lease, if that's acceptable to you.

THE COURT: So I guess that's where we are. So we're really going straight to oral argument.

MR. FIEDLER: That's right, Your Honor.

THE COURT: Okay. That wasn't exactly the way I thought it was going to proceed but that's fine, so why don't we get started?

MR. FIEDLER: Okay. Great. Thank you, Your Honor.

THE COURT: Does anyone have any issue with that?

(No audible response)

THE COURT: Okay.

MR. FIEDLER: So, Your Honor, Pinnacle Hills first, where I'd like to start is the plain terms of the Pinnacle Hills lease, which clearly permit the debtors to assign the lease to Michaels, and the landlord hasn't proposed anything that would suggest otherwise.

So, first, under the Pinnacle Hills lease, the debtors are authorized to use the premises for any permitted use, and that term is broadly defined as any lawful use not specifically prohibited by Section 13.11 of the lease. And when we turn to that section of the lease, the language provides that the tenant cannot use the premises, one, for any prohibited use, or two, in violation of any of the existing exclusives.

Now, on the first point, prohibited uses, those are identified in Exhibit L of the lease, and they include things

like laundromats, medical centers, tattoo parlors, and other non-retail uses. They do not, however, include things like the operation of a Michaels store. And the debtors believe the landlord is largely in agreement with that.

I'd just point Your Honor to Page 69 of Mr. Aronoff's deposition transcript.

THE COURT: All right. Let me just grab that. This is Amendola.

MR. FIEDLER: I know, there's a lot.

THE COURT: Okay. Page 69?

MR. FIEDLER: Page 69.

Essentially, Mr. Aronoff was asked whether after his review of Exhibit L whether any of the prohibited uses on that exhibit raised an issue as to Michaels store and the operation of a Michaels store and whether that would violate any of the enumerated uses in that exhibit. And Mr. Aronoff clearly confirmed that they didn't. And I think that's not only evidence that this operation of a Michaels store is permitted as it doesn't violate any of the enumerated uses in that exhibit, but the landlord hasn't proposed anything to suggest otherwise.

The second point I'd make is on the existing exclusives. Section 13.3.1 of the lease obligates the debtors to honor the existing exclusives that are identified in Exhibit K1 of the lease. The existing exclusives include eight

tenants, none of them are Hobby Lobby or Dollar Tree. And I think Mr. Aronoff acknowledges that fact in Page 72 of his deposition transcript.

But more importantly, Your Honor, the Pinnacle Hills lease and the discussion of existing exclusives expressly disclaims any obligation by the debtors to honor any exclusives besides the existing exclusives. And what that's getting at is really any future exclusives. And on this point, I think there's a few points to note from Mr. Aronoff's testimony, which is first, on Pages 76 and 77, Mr. Aronoff acknowledges that the Bed Bath lease makes clear that if an exclusive is not expressly mentioned in that Exhibit K1 of the Bed Bath lease, then it is not binding on Bed Bath which is, I think, an important point, Your Honor, that there are no exclusives within the lease that would prohibit the assignment to Michaels.

Second, Your Honor, on Pages 74 and 75 of his deposition transcript, Mr. Aronoff acknowledges that there was never an amendment to the Bed Bath lease with the landlord that would have bound Bed Bath to the Hobby Lobby or the Dollar Tree exclusives. And in fact, the landlord never asked for such an amendment, even though it had the option to.

And what's interesting here, Your Honor, is that the landlord has had an opportunity previously to offer that to Bed Bath. Years ago, when the landlord was agreeing to bring Hobby

Lobby into the shopping center, it had to look to Bed Bath to get express approval for entering into the Hobby Lobby lease. And as Mr. Aronoff makes clear in his testimony, that prior amendment to the Bed Bath lease, which included allowing Hobby Lobby to come into the shopping center, did not include any exclusive for Hobby Lobby or any other tenants in the shopping center.

And so while the landlord had the option to ask for that, for some reason it chose not to.

THE COURT: What did you refer to pages of the --

MR. FIEDLER: Yeah. That was Page 74 and 75 and 76 and 77 of the deposition transcript.

THE COURT: Okay.

MR. FIEDLER: And, Your Honor, as the debtor's witness, Mr. Amendola, makes clear in his declaration, leases often include these sorts of future exclusives and landlords expressly require tenants to comply with the future exclusive, and that was noticeably missing from the Pinnacle Hills lease. And so, I think it's clear, Your Honor, that just based on the plain language of the lease, an assignment to Michaels does not violate the prohibited use or the exclusive use provision or any other provision in the lease.

And, Your Honor, since the landlord is unable to show that the plain terms of the Pinnacle Hills lease prohibit the assignment to Michaels, the landlord instead turns to a gross

mischaracterization of the language of Section 365(b)(3)(c) to stand in the way of the assignment.

As Your Honor is aware, there's two key elements to 365(b)(3). When a debtor looks to assume and assign a lease, first, assumption and assignment of such lease is subject to all provisions thereof. And second, it will not breach any such provision contained in any lease, financing arrangement, or master agreement relating to such shopping center.

And I think what's important to note here, Your Honor --

THE COURT: What is the gross mischaracterization there? I mean, I understand the various arguments as to why your side is saying that really refers to leases to which the debtor was subject, but doesn't it say any other lease in the shopping center?

MR. FIEDLER: Your Honor, I think the case law on this is very clear, both in the Toys case, the Trak Auto case, the cases from SDNY and Martin Paint Stores and Ames Department Stores, which is that that language is referring to any lease that the debtors have entered into or master agreement relating to the shopping center that the debtor has entered into. And it cannot be the case, and Congress did not intend it to be the case, that the debtor would be bound by potentially several hundred provisions in hundreds of leases to which it could not possibly know about because it never negotiated those leases,

it never signed off on the provisions in those leases, primarily because here, the lease that the debtor entered into came well over 10 years before the other leases that the landlords are referring to.

THE COURT: Am I allowed to, I think you just kind of implicitly said that that is what it says, but they can't have meant that. So, it says it, but you're asking me to say that's what it says, but it can't be what they meant.

MR. FIEDLER: Well, I think --

THE COURT: Isn't that what the argument is?

MR. FIEDLER: I think there's two points on that, Your Honor.

The language says it will not breach any such provision contained in any other lease, right? And it is a tenant of contract law that a party can't breach a contract to which it was never a party. And so that language is referring to leases that the debtor had actually entered into or master agreements that document the terms of the shopping center, which we noticeably don't have here in the Pinnacle Hills lease.

THE COURT: But isn't the landlord saying, and I don't want to steal anyone's thunder, but isn't the landlord saying that in response to that argument that the lease between Hobby Lobby and the landlord is being breached? And that's a lease in the shopping center.

MR. FIEDLER: That's right, Your Honor, but the lease is being breached by the landlord not the debtor, and I think what's important to note here is the legislative history which really supports the reading that the debtors and Michaels have proposed, which is that Congress intended this language to preserve the landlord's rights in respect of its lease with the debtor and any other applicable agreements, and that includes master agreements to which the debtors had entered into.

Specifically, when enacting 365(b)(3), the House Judiciary Committee discussed the import of looking at the debtor lease. And I'm quoting from a report which says, "A shopping center is often carefully planned and apprised, and though it consists of numerous individual tenants, the center is planned as a single unit, often subject to a master lease or financing agreement. Under those agreements, the tenant mix in a shopping center may be as important to the lessor as the promised rental payments."

And I know we're delving a bit into tenant mix, but I think it's abundant and clear that the House Judiciary Report and the other legislative history bits that are cited in our papers make clear that the master lease or the financing agreement that Congress speaks of is one in which the debtor, as the shopping center tenant, had entered into and made itself bound by.

And I think, Your Honor, the Toys case rightly

recognized this, and you'll hear a lot about the Toys case because the facts there are nearly identical to the facts here. And there, the Court said that the assignment could go through because the assignment did not violate the terms in the debtor's lease, which the debtor had bargained for with the landlord.

And I think what that court was getting at is what is, not only did Congress not intend for a debtor to be bound by several hundred leases, but recognized the practical importance of not making a party bound by a contract to which it has no clue about what's in it. And so I think any other reading, including the reading that the landlords propose, would lead to the absurd result that the debtors must be knowledgeable about the terms, provisions of potentially hundreds of other contracts to which they never entered into.

THE COURT: So the argument really is that the plain language says what it says, and the general rule is that if the language is plain, the analysis really ends there unless it leads to an absurd result and that's what's being argued here.

MR. FIEDLER: Well, that's right, Your Honor. I think the plain language was intended to refer to leases and other agreements to which the debtors were actually party to. And the legislative history supports that and the fact that it would lead to these absurd results and unjust results that a debtor would be bound by a contract it has no clue about

clearly weighs in favor of not only the debtors' reading of the statute, but the several other courts that have read the statute the same way, both in Toys, in Trak Auto, and a number of the SDNY cases.

THE COURT: So then it's even a little further than that. It's kind of the flip of the landlord plain language argument. You're saying the plain language of (b)(3) and (C) refers to only the lease with the debtor.

MR. FIEDLER: That's right, Your Honor. Or any master agreement that the debtor had entered into as part of the shopping center arrangement.

THE COURT: But don't I have to go to legislative history or other sources to get to that?

MR. FIEDLER: Well, I think, Your Honor, yes, the case law is pretty clear. I did not see one case cited in the landlord's, not only Pinnacle Hills' landlord, but the Serramonte and Fountains landlord briefs, which said a court was looking to something other than a debtor's lease in analyzing the assignability of a contract under 365(b)(3). So I think that's important to note that accepting the landlord's reading would really be breaking ground here and at odds with all of the existing case law as well as the legislative history.

THE COURT: Okay.

MR. FIEDLER: With that, Your Honor, I'd like to turn

to the landlord's reading of 365(b)(3) as it relates to 365(f)(1), which really turns a blind eye to the fundamental protection that the bankruptcy accords debtors, which is, as Your Honor's aware, the Code greatly favors the debtors' free assignability of its contracts. And in that spirit, courts, both in this circuit and others, acknowledge that Section 365(b)(3) of the Bankruptcy Code is not meant to be read in isolation, but rather is meant to be read in conjunction with 365(f), which it explicitly cross references.

And this is exactly what the Court held in the Delaware case in Rickel Home Centers. And so when interpreting 365(f), courts have construed the terms of leases to not only render unenforceable lease provisions would prohibit assignment outright, but also those lease provisions that are so restrictive that they constitute *de facto* anti-assignment provisions.

And here, Your Honor, I can't think of a more clear *de facto* anti-assignment provision than the imposition of the exclusivity provisions in the Hobby Lobby lease and the Dollar Tree lease, which --

THE COURT: But doesn't it say (f)(1) says except as provided in (B) and (C) of 365? And wasn't it amended to make that clear.

MR. FIEDLER: That's right, Your Honor. But as the Toys court pointed out, and as the Fourth Circuit held in Trak

Auto, that did not mean that 365(f)(1) can never be used to invalidate a clause prohibiting or restricting assignment in a shopping center lease. And I think that is largely exactly in line with Congress's intent, which is that what Congress meant in focusing on restrictive provisions was to focus on those provisions that are in a debtor tenant lease that it had agreed to.

And to the extent the bankruptcy court at the time was seeking to disregard those covenants in a proving assignment, that is what Congress intended to avoid. And so, I think the provisions that are in the Hobby Lobby lease and the Dollar Tree lease are not binding on the debtors simply because they constitute *de facto* anti-assignment clauses under 365(f)(1).

THE COURT: But all they're saying is that -- in other words, let's just say, for example, that the Hobby Lobby lease was entered into before the Bed Bath & Beyond lease, and there was restriction on that. That would prohibit the assignment, right?

MR. FIEDLER: Well, I think, Your Honor, to engage in your hypothetical, there have been a number of objections in these cases filed because there were prior in time exclusives, and the debtors didn't go forward with those assignments in part because they were prior in time. Here, we're talking about leases that came at least 10, in some cases, 15 years

after the debtors entered into their lease. And so --

THE COURT: Right. So it's not -- so but I guess that -- my point was that it's not that C is an anti-assignment clause or prohibits the assignment. It just says a valid restrictive use has to be honored in a shopping center lease, right?

MR. FIEDLER: Well, I think, Your Honor, Congress was clear that those restrictive provisions are those to which the debtor tenant had agreed. As explained by Senator Hatch in the Congressional House Report, he's made clear that it is my understanding sorry, I'll start over.

Congress decided that use or similar restrictions in a retail lease, which the retailer can't evade under non-bankruptcy law, should not be evaded in bankruptcy. It's my understanding from Mr. Hatch that some bankruptcy judges have not followed this mandate. Under another provision of the Code, Section 365(f), a number of bankruptcy judges have misconstrued the Code and allowed the assignment of a lease even though the terms of the lease are not being followed.

And clearly in that language, Mr. Hatch is referring to the lease that the debtors had entered into. And so I think that's important to note that 365(f)(1) can be used or should be viewed in conjunction with 365(b)(3)(C) to prevent the assignment, or to allow the assignment of a lease despite a restrictive covenant in a lease in which the debtors were not

party to.

So, unless Your Honor has any other questions on that, I'd like to turn now to tenant mix, which as Your Honor is aware, the landlords assert that the proposed assignment to Michaels will disrupt tenant mix and balance in violation of (b)(3)(D) of the Bankruptcy Code. All of the evidence in the record and the controlling legal precedent on this tells a very different story, Your Honor.

As Your Honor may know, as with 365(b)(3)(C), 365(b)(3)(D) must be interpreted to refer to the contractual protections in the debtors' lease or a master lease in which the debtor had been party to. That is directly from the Ames Department Stores case the Toys R Us opinion as well. And, Your Honor, as I've mentioned, there's no master lease or similar arrangement in the Pinnacle Hill Shopping Center, which you would ordinarily suspect at a shopping center. And the landlord really hasn't pointed to any provision within the debtors' lease that would speak to the intent to maintain some sort of tenant mix and balance in the shopping center that would otherwise prohibit the assignment to Michaels. But --

THE COURT: Well, what about the one that allows them to terminate? I understand that's not enforceable in bankruptcy, but what about the one that allows them to terminate if they don't agree with the proposed use?

MR. FIEDLER: That's right, Your Honor. The landlord

does assert that Section 15 of the lease it has a right to terminate the lease outside of bankruptcy. But they do acknowledge that that provision would be an anti-assignment clause unenforceable in Chapter 11. But what the landlord conveniently omits is that the landlord would be required to pay the tenant substantial damages in the case it were to terminate the lease based on a proposed unacceptable assignment.

So by blocking the assignment in Chapter 11 and not paying the tenant substantial damages that it otherwise would outside of Chapter 11, the landlord is asking the Court to enlarge the bargain for protections that it had agreed to back when it signed the lease. And, Your Honor, the debtors don't think that is appropriate, nor does the case law support that.

THE COURT: But my question to you was, I thought your argument was that they didn't deal with the use in the lease. And I think the argument that's being made is that they dealt with it by saying it's a termination if they don't like it and they have to pay substantial damages or whatever the damages are. I don't really know what they are. But they have to pay damages if they don't agree with the use. That feels like they were concerned about the use to me.

MR. FIEDLER: Well, I think, Your Honor, this goes back to the point I made a little while ago, which is, if the landlord really thought that the coexistence of Michaels and

Hobby Lobby and Dollar Tree and Michaels would be detrimental to the tenant mix, they would have negotiated that in the debtors' lease. And they had the opportunity to do so when they asked Bed Bath & Beyond to waive the otherwise prohibition on Hobby Lobby coming into the center.

And so Mr. Aronoff made clear in his deposition testimony that they had the opportunity to do so and they opted not to. And I think that speaks to the fact that the landlord is not seeking to -- there hasn't been an intent within the lease to maintain tenant mix and balance.

But I do want to hit on one rather interesting and I think flawed point, which Your Honor mentioned at the outset of the hearing, which is that despite the clear language in the statute referring to shopping center, when looking at tenant mix, the landlord is saying we must look at a few stores within the shopping center and not the whole shopping center itself. And I think that's a very dangerous argument to make, Your Honor, because the shopping center is clearly defined in the lease as encompassing the entire Pinnacle Hills property, not just the power center, which is only consisting of 12 stores and a fraction of the square footage of the over million square feet shopping center.

And I think --

THE COURT: I was going to ask Mr. Lehane that because that's what I thought it said as well.

MR. FIEDLER: Yeah.

THE COURT: I guess we'll save that for when he's up here.

MR. FIEDLER: I think, Your Honor, I'd like to point the Court to page 65 of Mr. Aronoff's declaration. And more -- sorry, not his declaration, his deposition transcript.

When Mr. Aronoff was asked whether referring to in analyzing tenant mix of the large complex, which is called the Pinnacle Hills Shopping Center, as defined in the lease, whether he was looking at that in analyzing tenant mix, or whether he was looking at analyzing tenant mix just in respect to the power center, he confirmed, and I quote, "that the Pinnacle Hills Shopping Center was not in our discussion. It was only the power center."

And like I mentioned, the definition of shopping center in the lease clearly refers to Pinnacle Hills Shopping Center as a whole, and it's not in any way limited to any subdivision within the shopping center like the power center. And I believe Mr. Aronoff acknowledged that in Pages 40 and 41 of his deposition transcript.

So, it's therefore really unclear, Your Honor, what evidence the landlord has put forward as to the lease agreement itself and the shopping center to support the notion that tenant mix is somehow disrupted at the shopping center as a whole. And so, I don't think it's appropriate, Your Honor, to

look to a few stores within a shopping center that has over a hundred stores and over about a million square feet and limit the tenant mix analysis to just about 250,000 square feet.

But, again, if we were to analyze tenant mix outside of the intention of the contractual terms that the debtors agreed to, like I said, there's over 100 stores in the Pinnacle Hills Shopping Center. There's at least 28 women's clothing stores, five children's stores, five department stores, six electronic stores, seven jewelry stores, and more and more. And of those a hundred, many of them sell the exact same items. But what is more telling is that over a hundred of those stores, there's only two stores that the landlord has identified that sell craft items. And not even both of those, the landlord admits, are not craft focused retailers.

And I'd like to point the Court to Page 46 and Page 48 of Mr. Aronoff's deposition transcript. Here, after scrolling through the entire tenant roster of the Pinnacle Hills Shopping Center with Mr. Aronoff, Mr. Aronoff admitted that Hobby Lobby was the only craft focused retailer in the shopping center and that he didn't know whether Dollar Tree was even a craft focused retailer, though he acknowledged they do engage in the selling of certain craft items.

And so, adding another retailer like Michaels that is engaged in the selling of craft products certainly does not disrupt the tenant mix of a shopping center with over a hundred

stores and perhaps two that are engaged in the sale of craft products. But, I think more telling, Your Honor, is as explained in Mr. Amendola's declaration, Michaels and Hobby Lobby coexist in at least 30 shopping centers across the country. And the landlord generally agrees with that. Indeed, Ms. Elliott's declaration acknowledges that at at least 19 of those locations, those two tenants coexist and likely more.

And the same is true of Dollar Tree and Michaels. And I think for that reason, Your Honor, there is a reason for that, Your Honor, and Mr. Amendola makes that clear in his declaration, which is that companies, particularly retailers, actually like to be located in close proximity to their competition because of the additional foot traffic it would bring, not only their store, but to the shopping center as a whole.

And assuming Michaels was a direct competitor of Hobby Lobby and Dollar Tree, which I'm not sure they are, those tenants may gain the additional foot traffic from bringing Michaels in there.

THE COURT: You're not sure if Hobby Lobby and Michaels are direct competitors? Or Hobby Lobby and Dollar Tree? Or both?

MR. FIEDLER: Michaels and Hobby Lobby and Michaels and Dollar Tree.

THE COURT: You're saying Michaels and Hobby Lobby

are not competitors?

MR. FIEDLER: I think, Your Honor, Mr. Aronoff's testimony focuses on Hobby Lobby being a craft focused retailer, and so it's possible that they are competitors. They likely are. But certainly not with respect to Dollar Tree.

But I think, Your Honor, the more important point is Congress's intent when enacting 365(b)(3), which I've hit on a bunch, which was to preserve the bargain for exchange between the parties and that's the debtor tenant and the landlord. And so, as I've mentioned, if there was any issue that the landlord foresaw with tenant mix and balance in bringing a store like Michaels into the shopping center, they would have negotiated that in the Bed Bath lease. And I really don't think it's appropriate for the bankruptcy court to entertain the landlord's request to enlarge the rights in its lease in Chapter 11 that it otherwise wouldn't have outside.

Lastly, Your Honor, I'd like to just turn to the rent abatement and damages point that was raised by the landlord where the landlord argues that the proposed assignment should be denied because if the lease is assigned, the landlord may be subject to certain rent abatements by Hobby Lobby under the terms of the Hobby Lobby lease. I think this argument fails on many grounds, Your Honor, and is frankly irrelevant to the discussion of the assignability of the contract under 365(b)(3).

First, Your Honor, there's nothing in the case law, and the landlord hasn't pointed to a case, that suggests a bankruptcy court must consider a landlord's supposed expected losses from its other contractual arrangements with other parties that the debtors don't know about as a result of the assignment of the lease. As the bankruptcy court in the Ames Department Stores case explained, Congress has determined that subject to certain statutory safeguards, the value of the debtors' leases should go to the debtors' creditors and that leases may be sold to achieve that end with or without the landlord's consent.

There is one point I'd like to make about the Hobby Lobby lease, which is there is an express provision in that lease related to rent abatement, which says in the event the tenant violates the Hobby Lobby exclusive without the landlord's consent, then rent abatement would be triggered. And I think, Your Honor, by overruling the objection and maintaining the status quo with respect to the language of 365(b)(3), the landlord would have met that requirement and would not be subject to the damages that it claims it might be.

That's the same view that the Martin Paint Stores case took in the Southern District of New York, as well as the view that the Toys court took in the Eastern District of Virginia that essentially a court order is a judicial action that may render the landlord incapable of complying with a

restriction on another lease, and therefore would excuse the landlord's performance under that provision.

THE COURT: What Martin Paint Store case are you referring to because there's a few of them, and I thought, or at least two, and one of them wasn't even really a shopping center case as I understood it.

MR. FIEDLER: I was referring, Your Honor, to cite 199 B.R. 258 (1996).

THE COURT: I don't have at my fingertips whether that's the one I'm referring to. I know what Toys R Us says, but I don't know Martin Paints. At least one of them did not have to address the issue because of well, didn't have to address the issue because it wasn't a shopping center and then there was another one where there was no standing found. So I'm not sure what Martin Paints adds to the discussion at this moment.

MR. FIEDLER: Your Honor, I think it's really the point that the law excuses performance if there's a legal impossibility of actually performing. And that's the quote from the Martin Paint case, I believe, which gets to the point here that if the landlord can't possibly consent, it doesn't need to be bound by the abatement provision in the Hobby Lobby lease.

So, with that, Your Honor, I think that really concludes my argument. I will say there is a lot of money at

stake here. We do not have any backup bidders. The landlord's reading of this statute would call into question any debtor's ability to maximize value of its estate for the benefit of all of its stakeholders, not just the landlord.

And I think accepting the landlord's reading of this statute would really jeopardize not only retail debtors but any debtor's ability to restructure in Chapter 11.

THE COURT: Okay. Thank you.

MR. FIEDLER: Thank you, Your Honor.

THE COURT: I mean, in terms of order, I think we're dealing with the Pinnacle Hills Shopping Center, at least, and Michaels certainly was supportive of that. It seems to me it makes sense to hear from Michaels and then hear from the landlord. Otherwise, there might be --

MR. FIEDLER: I think that makes sense, Your Honor.

THE COURT: All right.

MR. FIEDLER: Thank you.

THE COURT: Mr. Hershey.

MR. HERSHEY: Good morning, Your Honor. Sam Hershey from White and Case on behalf of Michaels Stores.

Just a few preliminary notes. I know that Mr. LeHane transmitted some slides last night and I have some thoughts on those but I think those thoughts are best saved for rebuttal after Mr. LeHane goes through them. So, I just wanted to up front reserve some time for rebuttal with the Court's

permission.

I do not have a slide deck for Your Honor. Everything that Michaels wanted Your Honor to consider was in our briefs, and on that note, I do just want to say, at the start of the hearing, Your Honor referenced the debtors' briefs and the landlord's briefs. Michaels did, of course, also file briefs, specifically a reply at Docket Number 1383, and a sur-surreply on Docket Number 2059. I just wanted that on the record.

THE COURT: Of course, Michaels has been here throughout. I apologize for that omission.

MR. HERSHEY: I just wanted to avoid --

THE COURT: I did not forget. I just omitted that.

MR. HERSHEY: That's all I wanted to confirm. Thank you, Your Honor. I appreciate that.

Anyway, despite not having slides, I do want to give Your Honor a brief roadmap of where I'm going to go today. There are really, as everyone's observed, two sections of the Code at issue, 365(b)(3)(C) and 365(b)(3)(D). I'm going to discuss each of them in turn. I think I will be able to avoid overlapping too much with Mr. Fiedler's argument. But what I want to do is talk about each, and in respect of each, what the law is and what the law should be. Because I think what Your Honor will find is that the law overwhelmingly, in some cases totally, supports the debtors' and Michaels' position, but also

that's the way it should be, because under the landlord's proposed view of the world, restructurings by retail debtors would be completely impossible.

And I'll get there, but before I do, let's start with the actual plain language of Subsection C. And I will just read it to make things simple. This is 365(b)(3)(C) starting with (3).

> "For the purposes of Paragraph (1) of this subsection and Paragraph (2)(b) of Subsection (f), adequate assurance of future performance of a lease of real property in a shopping center includes adequate assurance,"

and cutting down to (C):

> "[T]hat assumption or assignment of such lease is subject to all the provisions thereof, including, but not limited to, provisions such as radius, location, use, or exclusivity provisions, and will not breach any such provision contained in any other lease, financing agreement, or master agreement relating to such shopping center."

So, the first thing that becomes really clear, looking at this, is Congress is focused on the lease at issue to be assigned. We see that in "such lease" and "thereof," the reference is clearly to the lease. But then of course there is a second part of that talks about other leases, financing

agreements, master agreements. And look, like items are grouped together. I forget the Latin expression for that, but we're talking about a master agreement that is by definition an agreement that the debtor will be a party to because it applies to all tenants, a financing agreement, again, an agreement that would apply to all tenants that a debtor would be party to, and then I guess where the rubber meets the road is with other leases.

And it's perfectly possible to imagine a situation where a debtor has multiple leases in a shopping center. Particularly, say, a franchise, where a franchisor might have multiple franchise locations in the same shopping center. And what the Code is guaranteeing to a landlord is that a debtor will not be able to use the terms of one of its leases to breach the terms of other leases to which it is a party with the landlord.

In other words, the Code is guaranteeing the benefit of the bargain that the landlord has with the debtor, right, not giving the debtor greater rights than what are in the leases that the debtor has actually agreed to. And on that note, I think we have confirmation of that point in the use of the term "breach."

As Mr. Fiedler observed, and as the landlord has agreed in its briefing, a party can only breach an agreement if it is a party to that agreement. What that means is that the

debtors' assignment to Michaels of their lease cannot be a breach by the debtors of the Hobby Lobby lease. The debtors are not party to that lease. It cannot be a breach by Michaels of the Hobby Lobby lease. Michaels is not party to that lease. And I'll take it one step further, I actually disagree with Mr. Fiedler on this point. It's not a breach by the landlord of that lease with Hobby Lobby. The landlord standing helplessly by and watching by operation of the Bankruptcy Code its lease be assigned over its objection is not taking any steps to breach that lease.

There's no breach of contract claim that Hobby Lobby can now bring against the landlord saying, "You did this, and by doing this, you breached our agreement." To the contrary, the landlord has been working very hard, as we know full well, to prevent the assignment to Michaels, and therefore, is not in any kind of breach.

There is, however, a breach happening here, and I think it needs to be noted. The breach that's happening here is a breach by the landlord of the debtors' lease. The landlord is seeking to import into that lease terms that the debtors never agreed to. And it's worth noting that it's a black letter rule under the Bankruptcy Code that a bankruptcy does not modify a contract. But that is exactly what the landlord is trying to do by taking terms that were agreed to after the debtors entered into their lease with the landlord

and seeking to apply them.

THE COURT: But doesn't the Bankruptcy Code modify contracts all the time, including particularly 365?

MR. HERSHEY: Well, fair enough, Your Honor. I think there are examples where the Bankruptcy Code carves out exceptions to that rule. For example, anti-assignment provisions and rules those out. But it is generally a tenant that, except for those exceptions, there is not a modification to a contract simply by the fact of a bankruptcy which is what the landlord is trying to do.

And I'll just note, Your Honor, there was an easy solution to this. There are multiple easy solutions to this that the landlord could have pursued before bankruptcy, right. The landlord could have written different restrictions into the debtors' lease. It could have said, this lease is only to be used for bedding, or whatever other purposes Bed Bath & Beyond would use it for. Or it could have said, this lease is subject to all future exclusives that this landlord may enter into. There are leases that say that. This is not one of them.

The landlord could have had a master agreement between all the tenants in the shopping center that says the leases in the shopping center should be used only for the purposes agreed to in that lease. That happens as well. It didn't happen here. And the Code actually specifically references master agreements for that reason. And the landlord

could have bid. Came to the auction, knew about it, chose not to bid, right. That would be a way to avoid the damages that it claims it's facing. I agree with Your Honor, there is no obligation for the landlord to do that, but it was an option. And it could have avoided being here today if it had bid. It chose not to. Michaels was the sole bidder at auction with no backup bidder, and that's why we're here today.

So moving on from the plain language of the statute, I do want to focus a bit on the cases, and Mr. Fiedler said it perfectly. Every case that we are aware of that was cited by any party favors the debtors' and Michaels' position. That's from the Ames case in 1991 from the Southern District of New York to the Trak Auto case, which is by the way the only Circuit level case on this issue from 2004, the Fourth Circuit, all the way up to the Toys R Us case in 2018.

And I want to pause there and just note, there's no disagreement among the parties that the Toys R Us case is directly on point. The facts are squarely on four with what Your Honor is confronting today. So not only is the landlord asking Your Honor to be the first court to rule differently and break from precedent on these issues, but also to rule against a case that considered these issues directly and decided in favor of the debtors and Michaels. And we think that's important.

THE COURT: Well, if they're saying that Toys R Us

got it wrong. That's basically it, right.

MR. HERSHEY: Yeah. Look, Your Honor, I agree. I will note that Toys R Us is in line with a substantial body of precedent. There is not a single case that's been cited that rules differently. So I understand the landlord disagrees with the case. But all the body of the law that's been cited is in line with Toys R Us.

I'll note, and Mr. Fiedler touched on this, it's not just the case law that supports the debtors' and Michaels' position, the Congressional record is crystal clear that what Congress was seeking to protect was the landlord's bargain for protections in its lease with the debtors. That's why so many of the cases that come out our way quote the Congressional record, and I'm going to do the same. Here's a quote.

> "When an owner enters into a use clause with a retail tenant forbidding assignments of the lease for a use different than that specified in the lease, that clause should be honored."

All right. That was Senator Orrin Hatch in 2005 talking about the Bankruptcy Abuse Prevention and Consumer Protection Act. Here's another one.

> "Congress decided that use or similar restrictions in a retail lease, which the retailer cannot evade under non-bankruptcy law, should not be evaded in bankruptcy."

Again, Senator Hatch focusing on the terms of the lease.

And last, this is from the House report on the Act that I just mentioned.

"Section 404(b) amends Section 365(f)(1) to assure that Section 365(f) does not override any part of Section 365(b). Therefore, for example, assumption or assignment of a lease of real property in a shopping center must be subject to the provisions of the lease, such as use clauses."

Again, Congressional focus on the lease itself. There is not a single example I'm aware of of Congress focusing on anything other than the provisions of the lease and the landlord's bargain for benefits under that lease.

Now, there is one case that the landlord tries to rely on in support of its argument under Subsection C, excuse me. That's the Sears case. And I'll just pause here and say it must have been a very difficult decision by the landlord to cite that case because Sears completely supports the debtors' and Michaels' position on Subsection D. And for that reason, I'll be coming back to Sears momentarily when I get to Subsection D.

But in the meantime, I want to note two things. First, the landlord's reliance on Sears isn't really based on Sears' discussion of Subsection C. It's based on Sears' discussion of Subsection A and the sort of application of that

Subsection C, or that discussion, rather, to C. There's no basis for that in the Sears decision. The Sears decision never says and this analysis should be applied to Subsection C. In fact, the Sears analysis completely disclaims such an application. And I'll just read from that case where the Sears court, and this is I can give Your Honor the pincite. It's 613 B.R. 51, 78.

The Sears court refers to 365(b)(3)(A) as having more stringent requirements and saying that it differs substantially from how a use clause or restriction on assignment addresses the landlord's ability to control the look and feel of its property. The Sears court also says, "The Bankruptcy Code," this is, sorry pincite 70, same case, "The Bankruptcy Code cannot be read to place the landlord in a better position than it would have occupied absent the bankruptcy."

And that's actually a good segue to the point I want to make about what the law should be, right. The landlord's position in bankruptcy and outside of bankruptcy.

Let's look at how things would work if the landlord had its way, okay. There's no dispute that outside of bankruptcy, this lease could be assigned to Michaels. There's no provision limiting the assignment right of Bed Bath & Beyond to assign to Michaels.

THE COURT: Other than the termination.

MR. HERSHEY: Other than the termination provision,

which is --

THE COURT: But that's a pretty big other, isn't it?

MR. HERSHEY: Well, fair enough, Your Honor, except to note that focusing specifically on the use provisions, which I think are what's relevant here because the termination right doesn't apply in bankruptcy, I think that's what we have to look at, is what Congress intended for the exclusive provisions. That's what C focuses on, so let's look at that.

There's no use provision, no exclusive use provision that would limit the assignment to Michaels. Now, under the landlord's perspective, if the landlord had its way, the debtors would be limited in their ability to assign their lease not just by the terms that they negotiated and agreed to, but by the terms of every other lease in the shopping center that they had no part in negotiating and never agreed to. And in fact, in this case, were negotiated and agreed over a decade after the debtors negotiated their lease.

Not only that, these are terms that the debtors do not know and cannot know. They are confidential, commercially sensitive terms in lease agreements that are not public and are not made public. And we know this firsthand because when this dispute started, we asked the landlord for a copy of the Hobby Lobby lease, and they refused. And when we pressed, they gave us this, which is on the docket. This is the redacted copy of the Hobby Lobby lease. Pages and pages of redactions of terms

that we still don't know and we can't know, right, but that the landlord might come forward and say, actually, there's this term that you had no way of knowing about, that's secret and confidential, but that bars you from making this assignment.

THE COURT: But I mean, if there was something in there that supported their position. If there was, for example, if there was a use restriction in there or some other term that indicated that, for example, Bed Bath & Beyond had agreed to it, or they had to go get their consent or something like that, I would --

MR. HERSHEY: Well, presumably, Your Honor, if we agreed to the term, we would know about it or we'd be subject to it. We would say, if we, for example, had in our lease a clause that said, "This lease is subject to all future exclusives," right, we would be saying, we may not know what those exclusives are, but we're subject to them. There's nothing like that here. We have no ability -- we've never agreed to those terms. We have no ability to know them.

And I get it. I mean, the last thing a landlord wants is for one tenant to know what's in another tenant's lease. It makes perfect sense why these would be secret and confidential. But what the landlord is arguing is that debtors effectively go into bankruptcy blind giving up their rights under their lease and making themselves subject to all other leases not knowing what those leases say. That cannot be what

the law is.

And to be clear, we're not talking about a small number of terms that the debtor makes itself subject to. I want to turn back, actually, to the language of the statute, which I read, which says that the assignment must comply with certain terms and, here I'm going to quote, "including but not limited to, provisions such as radius, location, use, or exclusivity."

So that's four specific terms, "radius, location, use, and exclusivity," that the landlord claims it can rely on to block an assignment, but it's not limited, right. It's "including, but not limited to." There's a potential infinite number of terms that the landlord can come into court and say, because this term is in another lease that the debtor never agreed to, never negotiated, didn't know about, we are able to block the assignment.

And here's where things get a little interesting. The landlord argues in its surreply, and Mr. Fiedler touched on this, that only the leases in the power center, which is a 12-store subset of the 100-store promenade, can be used to block the assignment. And we all know why the landlord made this argument. Because the landlord doesn't want to make the extreme argument. There are hundreds of leases with hundreds and hundreds of terms that it could rely on. It wants to try to limit its position to focus just on 12 because the Court may

be more likely to agree if the position is less extreme. I have three responses to that.

And the first is that even if we were just talking about 12 other leases, based on the four non-exclusive terms in the statute that I just read, that's about 50 terms still that the landlord could come into Court and argue, any one of which blocks the assignment. But second, the landlord is simply wrong. As Mr. Aronoff acknowledged in his deposition, and as clear in the terms of the lease, and I'll read the lease, Section 1134 says the following, creates the defined term shopping center.

And it says, "The shopping center, known as Pinnacle Hills Promenade, located in Rogers, Arkansas, consists of two retail shopping centers, which shall be operated as a single integrated shopping center. One, the so called big box center, in which the premises shall be located, containing approximately, whatever, square feet. That's called the power center. And, two, the regional outdoor mall anchored by certain stores designated the promenade." Okay.

The lease makes crystal clear that as far as the plain terms of the debtors' and the landlord's agreement are concerned, there is just one shopping center, and all of these terms apply to that shopping center with 100 plus stores. And the last thing I'll say on this point is that, regardless of the legal distinction under the lease between the 12-store

power center, the 100-store promenade, it's really irrelevant, because whatever this Court rules doesn't just apply to this case. It applies to every case. As we note in our brief, the result of the Court ruling in the landlord's favor is that debtors will have fewer rights in bankruptcy than they would have out of bankruptcy.

Out of bankruptcy, as I said, and subject to I understand the termination provision, but just focusing on the use provisions, there's no dispute that a tenant's ability to assign its lease is based solely on the terms of its lease, and the terms of other leases to which it is not party are irrelevant. But in bankruptcy, according to the landlord, all that changes. In bankruptcy, even if the debtors' lease had no provision that would preclude a proposed assignment, as is the case here, the landlord can step forward and say, "Sorry. Lease Number 67 has this term that prevents the assignment." Or, "Sorry. Lease Number 114 has this term, and you can't make the assignment." That's not what the law is. It's not what the law should be.

I'm going to turn quickly to Subsection D. I think I can be brief here. I'm going to touch on the evidence, although I think Mr. Fiedler did an excellent job with it, and I'm going to largely rest on his discussion of the evidence. I also think the parties have sort of moved on from the evidence. As Your Honor observed, we were supposed to have a big

evidentiary hearing. That's not what happened today. And I think the reason for that is really this is about the law, and that's always been Michaels' position, and I think the cases bear that out.

And in terms of the law, the best place to start is the Sears case because the landlord relies on that case, and I don't think the landlord can credibly argue that the Sears court got it exactly right on one subsection of 365(b)(3), but exactly wrong on another section of 365(b)(3). And on Section 365(b)(3)(D), Sears completely supports the debtors' and Michaels' position. And I'll just read from that case. This is at pincite 74.

> "Put more generally, where there are few or no use restrictions on a demised premises,"

I want to pause and just focus on use restrictions, because that's what the Court considered, not other terms, not related to use restrictions, but use restrictions.

> "[A]nd the assignee agrees to be bound by whatever restrictions do exist,"

as the (indiscernible) has here,

> "[A] court may deem the adequate assurances under 365(b)(3)(D) to have been given."

That's it. Right. The focus is on the lease, the use restrictions in the lease, and whether those are satisfied.

And there is no dispute that with respect to the use

provisions here, those are satisfied, and therefore so is 365(b)(3)(D).

Now, Sears also does a very good job, and I want to note this, distinguishing the one case the landlord identifies in support of its position on Subsection D, and that's the Federated Stores case, which is out of Ohio from 1991. And what Sears observes is that the landlord's ability in that case to block the assignment under Subsection D was based not on protections the landlord received or bargained for under the debtors' lease, but rather under the debtors' plan that of course was entered into subsequent to the lease, and obviously that's not the case here.

Now, with regard to the evidence, I want to make just one point. I think I have to address the Powers declaration. We're not putting it into evidence today and I just didn't want to not say anything about it. But what I do want to note is that I don't think we even need it in evidence because the Elliott declaration submitted by the landlord basically puts everything in the Powers declaration into evidence for us. And in particular, what the Elliott declaration shows is that Michaels and Hobby Lobby coexist in dozens of shopping centers, in some cases, right next door to each other.

The last thing I want to touch on is I want to address the landlord's alleged damages that it claims it will incur from the assignment to Michaels, which, by the way, are

damages that it bargained for and it agreed to under the Hobby Lobby lease. But look, in the first instance, I would note that those damages are illusory.

Under the Hobby Lobby lease, as long as the landlord makes good faith efforts to object to the assignment, damages cannot be enforced. Moreover, Mr. Fiedler, and I know Your Honor discussed this, the Toys case expressly addressed this issue and held that if the Court enters an order approving the assignment, then the landlord is not in breach.

Second, the landlord's alleged damages, even if real, are simply irrelevant. There is no provision of the Code that instructs the Court to consider those damages. And I don't mean to be glib here, but as Judge Glenn of the Southern District once said to me, sometimes in restructurings, people get restructured.

There are hundreds, thousands of unsecured creditors in this case who are recovering pennies on the dollar. There are lots and lots of people who could stand up before Your Honor and complain about what's happening to them in this bankruptcy case. And it happens every day of every week of every month of every year in this building. That's bankruptcy court. It's just how it is.

Now, the Bankruptcy Code does provide certain special protections to landlords, and those provisions should be enforced. But what the Court should not do is create new

protections that have no basis under the law and that impede the ability of debtors to restructure, as the landlord seeks to do here.

Thank you.

THE COURT: But isn't the argument that, the whole argument is it's not a new protection, it's what it says. That's the whole argument.

MR. HERSHEY: Well, that no court has ever found to exist. I mean, that's why it's new. Yeah. Yes, Your Honor. No court has ever found this. The Congressional record doesn't indicate it. That is the basis for my saying it would be a new protection for this Court to break new ground and break from precedent, frankly.

THE COURT: Okay. Thank you.

MR. HERSHEY: Thank you, Your Honor.

THE COURT: Mr. LeHane.

MR. LEHANE: Good afternoon, Your Honor. Robert LeHane, Kelley Drye and Warren, on behalf of Pinnacle Hills LLC, the landlord at Rogers, Arkansas, and also Daly City Serramonte Center, the landlord at the Serramonte Center.

Your Honor, it's been briefed extensively. Just heard a lot from Mr. Fiedler and Mr. Hershey. The essential summary of our argument, I think they've stated it well, and you, I think, understand it as well. Our view is the proposed assignment to Michaels will breach use restrictions in two

other tenant leases in the shopping center, Hobby Lobby and Dollar Tree.

And, Your Honor, those are protected leases. The fundamental disagreement here is, A, that the statute, we believe, is absolutely clear. We don't think you need to go beyond the plain meaning of the statute. We think the Third Circuit is very clear on that in the case law. We also think it's important to note, the Third Circuit in Joshua Slocum pointed out, this is a very heightened burden. But since the debtors and Michaels have spent a tremendous amount of time on legislative history, we think it's important then for us to visit the legislative history. So I want to talk about the plain meaning, the legislative history, and common sense, Your Honor.

So, with respect to tenant mix and balance, common sense just tells you when you put the number one competitor one door down from its competitor in a specific arts and crafts retail chain, that you're going to disrupt the tenant mix and balance in that power center. I'm happy to talk about the shopping center and whether we're defining one larger shopping center that the lease clearly says is two shopping centers later.

THE COURT: But when you say that, it's clear that -- but there is evidence that not only that sometimes it's better to have competitors next to each other, but also that, in fact,

there's at least two that I recall from Ms. Elliott's declaration that say they're adjacent to each other, Hobby Lobby and --

MR. LEHANE: Right.

THE COURT: -- Michaels.

MR. LEHANE: Right. Well, I'd like to discuss that when we discuss tenant mix, but I would also submit that tenant mix is about this shopping center, not any other shopping centers. For that reason, Powers declaration was irrelevant. We went through it because it would have been put in evidence, but it's not relevant to the analysis of this shopping center and tenant mix in this shopping center.

But, Your Honor, I think it's helpful to actually look at what we're talking about here and take a look at it. So, what we have here is the Pinnacle Plaza is a 12-store power center that's circled in blue, and it's in the upper right hand corner. And the promenade is below that, you have the promenade, and it's a much larger number of stores. If it would help Your Honor, I have this also in paper, so you could look at it on paper.

But, the power center is made up of those stores. Bed Bath & Beyond is highlighted in yellow. There's T.J. Maxx in the middle, and there is the Hobby Lobby store right next to it. And there are nine other stores in that separate power center, a shopping center, and as the only evidence we have on

that is from Jeffrey Aronoff, from Senior Vice President, who was involved in this whole project. He's been there. He has personal knowledge. And he specializes in optimizing the tenant mix and balance in shopping centers.

This is treated as a shopping center. Promenade is a shopping center, and, yes, Mr. Hershey read into the record exactly what the lease says. There's two shopping centers that they operate as one integrated shopping center.

THE COURT: So I'm supposed to effect the plain language on 365(b)(3)(C), but not in the lease?

MR. LEHANE: And the lease as well because the lease says there's two shopping centers that we're going to treat as one integrated shopping center.

THE COURT: As one integrated.

MR. LEHANE: Yeah.

THE COURT: And the parties agreed to it. That's not even a -- that one I have a hard time with because there's an agreement that it's one integrated center. So why would they agree that is one integrated center when that's an issue in every shopping center case? It's used to be an issue, but then landlords dealt with it by saying, this is a shopping center and you got to agree to that, right. So I'm having a hard time with that.

MR. LEHANE: Okay. Do you want me to address tenant mix right now? Or can I go through --

THE COURT: I mean, I think you are addressing it because you're telling me that I've got to consider just the power center, even though that's not what the lease defines as an integrated shopping center.

MR. LEHANE: Well, let me try to encapsulate the argument on that and then I want to walk through this as well.

It's the debtors' burden to show that there will not be any disruption in tenant mix and balance in the center and the evidence doesn't show that. In fact, the evidence shows the opposite. Both Mr. Aronoff and even Mr. Amendola admitted there will be an impact and there will be a disruption in tenant mix and balance. It's in both declarations. So not only do the debtors not have any evidence showing that there will not be any disruption, but the evidence to the contrary shows that there will be a disruption in the tenant mix and balance in the shopping center.

So I think the debtors have not met their burden with regard to tenant mix and balance. It is the debtor's burden and they simply haven't met it. And common sense says that if you put the number one retailer in arts and crafts one door down from its number one competitor, there's going to be a disruption. The other evidence, I believe, that this will disrupt the tenant mix and balance is the fact that the two other tenants in that portion of the shopping center have specific provisions in their leases saying that this is a

protected use or a prohibited use would be to allow either an arts and crafts retailer specialized in that within this part of the shopping center, the power center, or expressly, Michaels is expressly a prohibited use under the Dollar Tree lease.

THE COURT: What did Bed Bath & Beyond know about that?

MR. LEHANE: Bed Bath & Beyond didn't know anything about it, Your Honor. That's a great question. It was executed 15 years before these two other leases were entered. And that gets to the question of the balance between what the shopping center protections did when the Code was enacted in 1978, and how the 1978 Bankruptcy Code drastically changed the rights of landlords after the bankruptcy had been filed.

So I think it's important, since we're talking about legislative history, to keep in mind, prior to 1978, Your Honor, the lease provisions that said if the debtor files for bankruptcy, I can terminate my lease, that was enforceable. And all the anti-assignment provisions in the leases were enforceable. So, the Bankruptcy Code does a wonderful thing for debtors and the debtors have done a good job of that here.

They have managed to dispose of over 200 leases. They've brought in $65 million. They've closed on 135 lease assignments. I think that utterly contradicts their worries that if you read the statute as it's written, as we believe

it's interpreted, you'll have absurd results. It's belied by the results that have already been achieved in this case.

But let's also talk about what Congress did when it passed the Bankruptcy Code in 1978 and it put 365 in place and it took out the *ipso facto* provisions in leases and it took out the anti-assignment provisions in leases. It also very specifically and very intentionally protected shopping centers. Not just the landlords, Your Honor, but all of the participants in the shopping center system.

It expressly protected the other tenants, the solvent tenants. And it also protected the lenders. Other parties than the debtor and the landlord are protected. Let's look at a couple snippets from the actual Congressional record from the Shopping Center's Protections Improvements Act of 1982. The title of the Act was designed to protect all of the participants in the shopping center. Why? Because shopping centers were an incredibly important part of the American economy and they remain so.

In 1978, there was approximately tens of thousands of shopping centers. Now, there are more than 100,000 shopping centers in the country. Congress said, shopping centers are an important sector of U.S. retail trade. The linchpin of the entire operation is the freely accepted and openly negotiated contractual agreements among the parties. While the operation of the bankruptcy law necessarily alters contractual

relationships, these alterations have direct and potentially crippling impacts on other shopping center businesses and consequently must be strictly limited and minimized.

They also said that Congress recognized and sought to deal with the potential harm to shopping centers and their solvent tenants, which arise when one tenant becomes bankrupt. They weren't talking about what happened when the lease was initially entered into, they were talking about protecting the tenants in the shopping center when one tenant files for bankruptcy and goes to assign the leases.

THE COURT: But which way does this cut, Mr. -- this is the first time I'm seeing this, I think. I don't know if this was in the papers. Was this in the papers?

MR. LEHANE: We cited to the Congressional record and we cited to the legislative history in the paper, Your Honor -- in our papers, and we'll go back to that. But --

THE COURT: But which way does this cut? It says, "The linchpin of this entire operation is freely accepted and openly negotiated contractual agreements among the parties." I mean --

MR. LEHANE: And then, what it goes on to say, though, is that to the extent the Bankruptcy Code is going to alter the contractual relationships, which it does to the landlord by removing, as you've noted, its right to terminate these leases, right, it must do so in a way that minimizes the

harm and is strictly limited. And there's another quote that says, when the trustee is unable to find a lease that can be assumed and assigned without violating use provisions, then the lease should revert to the landlord.

So I think we'd like to also walk through adequate assurance of future performance. And this is part of the Bankruptcy Code since inception. And 365(b)(1) starts with that it's the debtor's burden to provide adequate assurance of future performance at the time of the assumption of the lease, right. So this adequate assurance is now.

And then 365(b)(3), we've talked about them a lot, A through D, those are the specific, that's the heart of the shopping center protections. And A and B, Your Honor, really go to the relationship between the landlord and its debtor, right. A is that the source of rent must be assured and there will be similar financial condition and operating performance between the assignee and the debtor at the time the lease was entered into. And B says there'll be no reduction in percentage rent. C and D, Your Honor, go to protection of the other tenants and they have since the inception of the Code.

Let's look at what 365(b)(3)(C) looked like when the Code was first passed in 1978. It was only one clause. And what it said was that "Assumption or assignment of the lease will not breach substantially any provision, such as radius, location, exclusivity, in any other financing agreement or

master agreement or lease relating to such shopping center."

It was only one clause, and it only protected the other tenants in the shopping center. That was the 1978 version of the Code. There was a problem. Some debtors were arguing that this assignment, even though it will reach the terms of my lease with the debtor, a use, a radius or exclusivity provision, since it won't breach any other leases in the shopping center, then I can go forward and have this assignment and the Court can ignore the provisions in the debtors' lease with the tenant as anti-assignment provisions.

So in 1984, the Code was amended to deal specifically with that problem. And when it did so, it specifically said in the legislative history, the debtors are ignoring the terms of their own leases and arguing that they're only required to comply with the other non-debtor leases. So the solution was to break this provision into two clauses and make sure that in connection with an assignment that the assignment can't breach the terms of the lease between the landlord and the debtor and similarly, will not breach any such provision with any other lease financing arrangement or agreement relating to such shopping center.

THE COURT: I didn't see any case that -- and maybe you can tell me otherwise. I didn't see any case pre-'84 or after '84 that cited to a provision in a lease to which the debtor was not party, or a master agreement to which the debtor

was not party, or a financing agreement to which the debtor was not subject, that said, this is how it works.

MR. LEHANE: Well, we would submit, Your Honor, that the plain language of this statute is so clear that it's never before been litigated to final decision until Toys R Us in 2018. That's really the only decision. And as we've pointed out at length in our briefs, the Toys R Us decision is deeply flawed.

First, it relies on Trak Auto. Your Honor, Trak Auto didn't deal with other leases. It dealt with the lease that the debtor had with the tenant and it went in favor of the landlord because the debtor tried to assign a lease to someone that was not an auto supplier. Trak Auto was an auto supplier and that lease said you have to be an auto supplier in order to use this. And so Trak Auto, in favor of the landlord. It does not support the logic of the Toys R Us decision.

In dicta in that, Trak Auto talks about Ames. And unfortunately, the Ames decision that they refer to was also not about 365(b)(3)(C). So, Toys R Us also ignores the whole second clause. We really believe it's a deeply flawed decision and it's not binding on this Court.

THE COURT: Okay. So you're saying it's just because it's so clear, it's not litigated.

MR. LEHANE: It hasn't been litigated.

THE COURT: Okay.

MR. LEHANE: So there's also the common sense portion of it and what Congress was clearly trying to do in the legislative history was protect all of the participants in a shopping center, not just the landlord. And we've heard argument that it's only protecting agreements with the landlord. Financing agreements, Your Honor, are oftentimes the agreements between the landlord and its lender. And they may --

THE COURT: Right, and they're recorded.

MR. LEHANE: Right.

The debtor wouldn't be -- no tenant would be a party to a financing agreement between the landlord and its lenders. But those are also protected agreements. There also may be reciprocal easement agreements. The Three A's Holdings case is a good example, and there's others, where the agreement that's being referred to that can't be breached is some zoning agreement, agreement with adjacent property owners, or a municipality stating -- the debtors have nothing to do with those. The tenants don't enter into those agreements, the landlord does.

THE COURT: But in Three A's, it was a restriction to which the debtor was subject. And the financing agreement either would be recorded or would be disclosed in the lease as saying this is a restriction in the use, so therefore, you can't do it. So, that's different than any other lease

being -- any lease that is entered into 14 years later, or a lease that the debtor doesn't know anything about, and it's troubling to me.

I'll be completely forthright. The plain language argument, I get it. It's a good argument. And this argument is a good argument, too. The debtors' argument and Michaels' argument is a good argument also. I think they're good arguments both ways. I guess I'm having a little bit of trouble with a fundamental fairness kind of issues to how you make somebody subject to the terms of a contract with somebody else that you have no knowledge of. It's hard to -- there was discussion of common sense on the mix. This gets into common sense as well.

MR. LEHANE: Yeah. And I think, Your Honor, the answer to that is, though, that outside of bankruptcy, the landlord still had the right to terminate these. And maybe there would have been some economic consequences or damages, and outside of bankruptcy, they can weigh that. They could have said, hey, Michaels wants to move into the vacant Bed Bath & Beyond space. We're not in bankruptcy. We will suffer damages, our other tenants, Dollar Tree, and Hobby Lobby. The provisions in their leases allow them to assert damages us, and they could weigh that. But the Bankruptcy Code removes that right, right.

THE COURT: Let me ask you this, Mr. LeHane. You're

a well regarded, experienced, knowledgeable landlord lawyer, right. And doesn't this look like, and I like looking at words of documents and things like that. When you look at the lease, Pinnacle Hill Lease with Bed Bath & Beyond, it looks like the landlord, with its really capable lawyers, negotiating and using its bargaining power with respect to Bed Bath & Beyond, which I think at the time was a very, very powerful and desirable tenant, going back and forth on lease terms, and they came up with a recognition that, you know what, we might put these use restrictions in here and have these issues in here, or these limitations in here, but if there's a problem and, for example, in this case, some crazy bankruptcy court says you can assign this anyway, as long as you fight it, I'm not faulting anyone for using violation in the objection.

But to say violation in the lease, right, as opposed to breach, it shall be a breach of the lease to assign to someone outside the use restriction. If it's to say a violation is different than a breach and doesn't give right, it wouldn't even give rise to any enforcement right because they dealt with it and that was a function of the bargaining power between the parties that Bed Bath & Beyond negotiated for a freely assignable lease.

And the landlord said, yeah, I want to get you in here and I got you in here and I had to give up the veto right, I guess, over the use restriction. But, A, I'm dealing with it

in this challenge provision and, B, then I can just go ahead and enter into a contract or lease with Hobby Lobby and say, you can't have one of the stores that was expressly permitted by the assignment in the BBB Pinnacle Hills lease.

That's a lot. Okay. That's like --

MR. LEHANE: I want to answer your question if I can --

THE COURT: Usually, to be subject to something, you've got to agree to it.

MR. LEHANE: Well, excuse me?

THE COURT: To be subject to something, you have to agree to it usually, right? I mean --

MR. LEHANE: True. But I think it's important to keep the background context. The landlord had rights and only the bankruptcy filing of Bed Bath & Beyond took those rights away. The Bankruptcy Code takes a bunch of rights away, but at the same time it then protects the participants in that complicated economic unit.

THE COURT: And isn't the landlord protected? So if the Hobby Lobby lease was entered into before the Bed Bath & Beyond lease and there was a use restriction that said you can't have a Michaels in here in the Hobby Lobby lease, we wouldn't be talking about this. It would be over. Right?

MR. LEHANE: That's correct.

THE COURT: We would be done. The landlord

couldn't --

MR. LEHANE: Wait, excuse me, in the Hobby Lobby lease?

THE COURT: I'm sorry?

MR. LEHANE: In the Hobby Lobby lease, there is. It says you can't allow Michaels.

THE COURT: I'm sorry. In the Hobby Lobby lease before the Bed Bath & Beyond. If the timing was reversed, right. The timing was reversed. Hobby Lobby is before --

MR. LEHANE: Bed, Bath --

THE COURT: -- Bed Bath & Beyond --

MR. LEHANE: Certainly --

THE COURT: And then, the Bed Bath & Beyond lease says you can't, you can assign, but you can't assign to another arts and crafts store.

MR. LEHANE: Right.

THE COURT: Then the landlord is fully protected with respect to the benefit of its bargain, right?

MR. LEHANE: Right. But the landlord can only protect the benefits of bargain to the extent it knows what its shopping center looks like now. And shopping centers are dynamic places, right. The leases don't all terminate at the same time. Things change over time, as evidenced by the Dollar Tree lease and the Hobby Lobby lease, which have come in within the last five years. The situation now is drastically

different than it was 15 years ago when the Bed Bath & Beyond lease was put in place. And Congress specifically protected the shopping centers now, at the time of the assumption, by giving protections to those other tenants for the situation now. And I think that's the plain meaning of the argument.

You can drive down really deeply on breach versus violation, but the plain reading and the way the statute was originally written was this is going to protect the other tenants against the failure of one tenant now, and the harms aren't that tremendous and terrific. I will say the original bid that Michaels put in for this was $100,000, Your Honor, and there has been exponentially greater amount of time spent on that because the absurd results that have been suggested by counsel for Michaels and the debtor, we would say are contradicted by the tremendous results achieved to date.

Whereas, the Toys R Us decision we believe is wrong and we believe following it would do extreme harm and undermine the specific protections that Congress intended the other participants in the shopping center industry to have. And it's a very careful balance.

And also, I'll say this. There's a lot of, or not a lot, but some mention by both Mr. Fiedler and Mr. Hershey that there's nothing in the Bankruptcy Code that could otherwise protect these landlords against these harms. And that's just absolutely incorrect as well. There's a very broad provision

that says -- it's 363(e) -- anytime the debtor sells, uses, or leases anything that another party has an interest in, the bankruptcy court shall provide adequate protection to the other parties with an interest in that property being used, sold, or leased.

That's a very broad provision. It's used in a lot of other contexts, right, and the Bankruptcy Code weighs and balances the harm when it's considering lifting the automatic stay or considering the appointment of examiners. It oftentimes demands that the courts look to the potential harms by what's going to happen.

Here we have a very specific provision of the Bankruptcy Code. Congress said you must protect the shopping centers not just the landlords, but the other parties as well. The financing agreements, the master agreements, and the other leases in the shopping center. And we think a very plain language, common sense read is why there's very little litigation on this.

I think if you read the decisions underlying Toys R Us, they're deeply flawed. And with respect to Sears, the important point of Sears, that the district court said this is a heightened standard, and the bankruptcy courts can't just rewrite the standards that Congress put in place because they don't like them. And why it's relevant here is because, in that case, it went to, A, it was the financial condition and

the judge found that transform is perfectly fine. It's got a net worth of $50 million, but he also found it is not of similar financial condition to the debtor when the tenant entered into this lease because when Sears entered into the initial lease, it was one of the most powerful financial companies in the world. They just were not similar.

And the district court judge said you may be correct that it is significant financial wherewithal, but that's not what the Bankruptcy Code says. And what the Bankruptcy Code says is very specific and clear and you can't just rewrite that to suit your purposes. So we think that here it would be suiting the purposes to let one narrow set of transactions go through that really is a very small subset, even of the total leases the debtors has tried to assign. They've assigned 135 leases successfully. We're hung up on three of them because they fall within protections that Congress provided to the Bankruptcy Code.

That's less than 5 percent of their total lease assignments. It's far less than the total amount of leases that they had, Your Honor. So, look, we understand that it's very important for the debtor to maximize its value. Both of these clients are also creditors of the estate, right. But it is a liquidating company, right, and they are difficult decisions. We don't think that the need to maximize value trumps the protections that Congress granted to the shopping

centers.

And in short, you --

THE COURT: How about in the Sears case that I thought -- I think that was Judge McMahon.

MR. LEHANE: It was. Colleen McMahon. Correct.

THE COURT: She went into a very, very detailed and thoughtful discussion about D, and how -- which D runs --

MR. LEHANE: The D argument --

THE COURT: -- in all candor, completely contrary to your C argument in a lot of ways, and your D arguments, because you said you just got to look at it in the context of the bargain between the debtor and the landlord.

MR. LEHANE: But you need to have evidence that there will be no disruption and she found there was no evidence of a disruption.

Here, to the contrary, the only evidence that we have is that there will be a disruption. Not only from the declaration of Jeff Aronoff, who specializes in tenant mix and balance, right. He worked on these properties specifically. He's been there. This is what Jeff Aronoff does, right. And he said there will absolutely be an impact, and a negative impact, on the tenant mix and balance in the shopping center.

THE COURT: But if you look at it in the context of the Hobby Lobby Pinnacle, I mean, I'm sorry, Bed Bath & Beyond Pinnacle lease, is it fair for Pinnacle Hills to get Hobby

Lobby as a tenant in part on the basis of the free assignability clause, and then, 14 years later, enter into a lease with a third party that they know nothing about, that Bed Bath & Beyond knows nothing about, and then restrict that very broad assignment provision? Isn't that kind of having it both ways?

MR. LEHANE: They had the right to terminate outside of bankruptcy, Your Honor, and --

THE COURT: Yeah, but you know that that's one that's not the 365(f) --

MR. LEHANE: Right.

THE COURT: -- and all that. That's different. But you know, that the other, as far as the B and C and all that. But I'm just having a bit of a more difficult time with that. It just seems like an unintended benefit to parties that were -- to the landlord who got the benefit of the tenant in the first place, and then just eviscerates it by entering into another agreement 14 years later that restricts the use in a manner that wasn't contemplated by that lease.

MR. LEHANE: Well, look, we think it's, in my mind, it's commercially reasonable for them to say Bed Bath & Beyond can use that for whatever they want to now, right. But, and if Bed Bath & Beyond changed its use, there was nothing that Pinnacle Hills could have done or the Pinnacle power center.

THE COURT: Arts and crafts.

MR. LEHANE: Right. Bed Bath & Beyond had an unlimited lawful use, right. But the point is, once you file for bankruptcy, you stop paying rent, you can reject the lease, completely breach it, right. And our claims under that are capped and we'll get paid whatever it is. In this case, there will probably be no return. And we no longer have that right to terminate. That was really the protection they had, was to say, if we're in a situation where the assignment is going to breach these other two leases, we have the ability to say, hey, Bed Bath & Beyond, you can't do that assignment.

And obviously, at that point, Bed Bath & Beyond has decided they want out if they're going to assign it outside of bankruptcy. And the landlord and Bed Bath & Beyond, by that 15.1.2, are able to have that negotiation, essentially.

THE COURT: So, if Bed Bath & Beyond just was doing a reorganization and part of the reorganization was that they were going to shift their focus from bed and bath to arts and crafts, and Hobby Lobby was already there, right, Hobby Lobby was already in there as an arts and crafts store.

MR. LEHANE: We would have a very different conversation going on, Your Honor, because if there's no assumption in an assignment of the lease, right, and then I believe that --

THE COURT: No, I said assumption. I said there is assumption.

MR. LEHANE: Right, but there's no assignment.

THE COURT: Right.

MR. LEHANE: Right, there's just assumption for purposes of changing their use. I think it's a very different conversation.

Bed Bath & Beyond had almost unfettered use of the premises, and that is different.

THE COURT: Why?

MR. LEHANE: Because there's no assignment and the Bankruptcy Code is very clear about this.

THE COURT: So what?

MR. LEHANE: So you don't get your shopping center --

THE COURT: If I do the plain language, right --

MR. LEHANE: Yeah.

THE COURT: If I do the plain language, wouldn't them changing to the -- it says the assumption or assignment, it doesn't say the assumption and assignment. It says assumption or assignment is subject to the provision of any other lease. And the Hobby Lobby lease says you can't have another arts and crafts store. Why is that different?

MR. LEHANE: Perhaps we would be -- I haven't considered this one before, Your Honor. I guess it is. It's --

THE COURT: It's not a bad argument.

MR. LeHANE: It's not a bad one. It's a good one.

(Laughter)

THE COURT: All right.

MR. LeHANE: And, look, going to 365(d)(3) to tenant mix to (d), it used to say substantial disruption. It doesn't anymore. They amended it, right. It's now any disruption, and it's their burden to show that there will not be any disruption. And I think the evidence that we have shows that there will be a disruption. So as a result, I think the assignment also fails on the tenant mix arguments.

THE COURT: Okay. All right.

MR. LeHANE: You know, Your --

THE COURT: I appreciate that. I thank you. Well, I guess parties wanted some rebuttal, and we'll get to 12:20. So I don't know what the plan is with regard to the other leases. Can you help me on that? Is that --

MR. LeHANE: So I think I probably can from my perspective, Serramonte Center. We also represent Daly City Serramonte Center. And many of the arguments are almost exactly the same. There may be some nuance to them, and counsel for Burlington or the debtors may want to make some.

But those are -- you have competitors, Burlington, Ross. And the Ross leases, it's undisputed that they have provisions in them which say you can't operate a certain percentage of the square footage in this center as a discount retailer, and that's what Burlington would be operated as. So

the argument is you'll be breaching these.

Now there's some nuance to those, but I think the larger arguments are the same, that Congress was protecting the landlord and the shopping center and the other tenants.

THE COURT: Even if they didn't have an agreement?

MR. LeHANE: Right. Yeah.

THE COURT: Debtor.

MR. LeHANE: Yeah, I think --

THE COURT: Or warrants subject to something that's --

MR. LeHANE: That's right.

THE COURT: -- runs with the land --

MR. LeHANE: Right.

THE COURT: -- like a master -- like the reciprocal --

MR. LeHANE: Yeah.

THE COURT: -- easement agreement and/or restrictive covenants or a master agreement or -- well, that might not run with the land.

MR. LeHANE: Yeah.

THE COURT: But a financing agreement, that kind of thing.

MR. LeHANE: Can you put the one other slide up, Phil?

There is one quote from the congressional legislation

that we think is, it's actually exactly the same hypothetical that we have here where the legislative history says if you had a women's wear store assigned to a men's wear store, that could have a negative impact on the other men's wear stores in the shopping center and we're protecting against that, that with both (c) and (d).

So certainly appreciate it, but the similarities between the arguments, Serramonte lease also has the right to terminate. The 15.2.1, it's almost exactly identical, right. And it would clearly breach the Ross exclusive protective use provision. Happy to answer any other questions on that.

THE COURT: I asked you enough questions.

MR. LeHANE: All right. Thank you, Your Honor.

THE COURT: Thank you.

MR. MAIRO: Your Honor, for the record, John Mairo of Porzio Bromberg & Newman on behalf of the Landlord DPEG Fountains, LP. Are we going to conclude with the Pinnacle arguments and then turn to Serramonte and DPEG? That's how I understood it. Or are we trying to do it all in one enchilada?

THE COURT: Well, I think that's exactly the question I had. And I think what Mr. LeHane said is that it's really the same arguments with Serramonte, just perhaps some nuances. So I think the rebuttal, unless you're going to just tell me that you agree with what Mr. LeHane said and then that would be for rebuttal for them, I guess. Unless you want to make new

and different arguments.

MR. MAIRO: I certainly want to argue for DPEG Fountains some different arguments. I don't know if it makes sense to do it now or let them rebut to the Pinnacle and Serramonte.

THE COURT: I think we might as well just finish Pinnacle right now, so yeah.

MR. FIEDLER: Okay, Your Honor. I'll be fairly quick here. Just --

THE COURT: Everybody says that.

MR. FIEDLER: Yeah. Just a few points on rebuttal.

Mr. LeHane talked about common sense at the outset. Not common sense to put the number one competitor next to each other. I don't know if they're the number one competitor, but the landlord acknowledges in Ms. Elliott's declaration that it happens all the time. At least 19 times and perhaps 30 times are they next to each other.

And so I think the common-sense argument in that respect is a little far-fetched. I will also say there was nothing prohibiting Hobby Lobby from entering into an amendment with the landlord right when Bed Bath filed to add every exclusive under the sun under its lease just knowing that Bed Bath might assign its lease out to another party.

And so it would be unfathomable to think that the debtors would be bound by an amendment to that lease that adds

say 100 exclusives including every other store that Bed Bath or Bed Bath was seeking to assign to a new tenant. And so common sensically, I don't think we should be binding the debtor to a lease that is subsequent in time and which the debtor had no clue was entered into. That's the first point on common sense.

The second point is on tenant mix. The landlord asked the Court to look to the Power Center and not the shopping center. And I think the inquiry ends right there. The shopping center is clearly defined in the lease as one integrated shopping center that includes the Power Center and the Promenade. And it would be one thing if the landlord said the tenant mix and the Power Center will certainly be upset but the tenant mix and the whole shopping center will be upset, as well. They didn't do that.

As Mr. Aronoff made clear in his testimony in his declaration, it wasn't even part of the discussion to address the shopping center. They only addressed the Power Center, and there's a reason for that, because there was no intent behind tenant mix and use for the entire shopping center. And even if there was, the landlord can't prove that it's disrupted by adding Michaels.

I will also say, Your Honor --

THE COURT: What about I think he said that you don't have any evidence that the tenant mix won't be disrupted?

MR. FIEDLER: Well, I think there's a wealth of

evidence, Your Honor. First, the idea that there are over a hundred stores in the shopping center and the landlord admits that there's only one that is engaged in a craft item-oriented business and that's Hobby Lobby. The other potentially being Dollar Tree, the landlord couldn't even confirm if that was a craft-oriented business. And granted, they do sell craft items, but there are several other stores in the shopping center that sell the same exact items.

Further, there's nothing in the lease or in a master agreement relating to the shopping center that specifies some intent to get to tenant mix and balance.

THE COURT: There is a master agreement?

MR. FIEDLER: There is not.

THE COURT: No.

MR. FIEDLER: And that's my point, Your Honor.

THE COURT: I thought you said there's nothing in the lease or the master agreement.

MR. FIEDLER: Or a master agreement. There --

THE COURT: There's no --

MR. FIEDLER: There is no --

THE COURT: There's nothing in the lease and there is no master agreement.

MR. FIEDLER: That's right.

So tenant mix requires an intended tenant mix. And there's a great example for why context matters and why that

interpretation should be applied to 365(b)(3)(C). Tenant mix does not exist in a vacuum, and a court can't decide what selection of stores is an ideal tenant mix. And I think the evidence shows that the landlord can't prove there's an ideal tenant mix, it can't prove there's a tenant mix that was intended. And I think the evidence shows that there is no tenant mix that is being upset here.

THE COURT: But that's not their burden. The burden is on the debtor to show that there's no disruption to the tenant mix.

MR. FIEDLER: That's right, Your Honor. I think the Amendola declaration proves that. I think the directory that we submitted to Your Honor shows that. And there's nothing in the landlord's deposition or testimony that would show any disruption to the tenant mix in the shopping center. They're only talking about a subcollection of stores in the Power Center. And that's just tenant mix.

I will say and want to address the point which is what we were discussion not too long ago about it being black letter law that you can't modify a lease subject to certain exceptions. What the landlord is asking you to do, Your Honor, is place additional restrictions in the Bed Bath lease that it didn't negotiate or ask to negotiate in the lease it executed or any subsequent amendment. So rewriting the lease to put an additional restriction on the debtors' ability to assign it is

not appropriate.

While the Bankruptcy Code does allow the modification of certain contracts, it doesn't do so in favor of non-debtor parties, as the Court ruled in Bon Ton Restaurant & Pastry Shop in the Northern District of Illinois, "It is not intended that a non-debtor party should acquire greater rights in a case under the Code than he has outside of the Code. A lessor cannot insist that bankruptcy law give him what the lease itself does not."

And I think that --

THE COURT: I don't remember that case. Was that case cited to me?

MR. FIEDLER: It's 53 B.R. 789, Your Honor, 1985 out of Northern District of Illinois.

THE COURT: What was the name of it?

MR. FIEDLER: Bon Ton Restaurant & Pastry Shop.

THE COURT: Okay.

MR. FIEDLER: And so that's what's really key, Your Honor, that the landlord is asking the Court to rewrite the lease.

And the last point I'll make about the rent abatement is it's really irrelevant -- or I'll stay on tenant mix for a second. It's really irrelevant what might happen to one tenant in the shopping mall, shopping center. The landlord makes the argument that Hobby Lobby would be significantly disadvantaged

by putting Michaels a store away from it even though that exists in numerous shopping centers throughout the country.

But what tenant mix really gets at is the proposed assignment creating an upset of the balance of the entire shopping center, not just what happens to Hobby Lobby.

And so I think, Your Honor, I can conclude there unless you have any questions. I do want to make actually one more point, and I'm going a little longer than I said I would. But I think you're right, Your Honor. If there is a covenant or zoning or master agreement that's recorded on the property that makes it enforceable against the debtor, there is notice in the record that the circumstance is that the debtor be bound by whatever is in that agreement. And if there was a restriction on the property, we would be bound by that and we would be put on notice of that.

But it begs the question why there's not a master agreement here or some sort of covenant prescribing certain use restrictions, particularly if this was supposed to be a shopping center that we're talking about. And so I think the fact that there's no master agreement is important in kind of relaying the fact that the landlord did not intend a tenant mix that the tenants be bound by.

So with that, Your Honor, I'll conclude unless you have any questions.

THE COURT: No, I don't have any more questions.

Thank you.

MR. FIEDLER: Thank you, Your Honor.

MR. HERSHEY: Good afternoon. I guess now it's afternoon, Your Honor. Sam Hershey from White & Case for Michaels. I will be extremely brief.

Two points, the first is Mr. LeHane makes the argument that Section 365(b)(3)(C) so obviously applies to the leases of other tenants in the shopping center that it's never been litigated. If it's so obvious, why has court after court said the opposite? I mean even if it is dicta, as he observes, court after court that we have cited to you have said that you look solely to the debtors' lease. Those courts have not found it so obvious that that provision means you look to other leases.

THE COURT: Well, other than Toys 'R Us, there's not that many courts that --

MR. HERSHEY: Well, no, that's not true, Your Honor. The Trak Auto case, the Ames case, I mean those cases -- I mean his response is that it's dicta, but those cases do say you look to the debtors' lease to determine the application of use provisions under 365(b)(3)(C).

The same could be said for the congressional record. Mr. LeHane went through a presentation with a lot of slides. I did not see a single slide showing a quote from the congressional record saying we have to look to other leases

beyond the leases that the debtor has agreed to, whether that's a master lease or the lease that the debtor has in the shopping center.

The last point I'll make, Your Honor, is on tenant mix and balance. We have an unambiguous lease agreement here. I'm not sure we need to look to the extrinsic evidence. I think we look to that lease agreement. But even if we were to do so, tenant mix is about the nature of the shopping center. I think Mr. LeHane actually made this point when talking about the men's wear versus women's wear. It attracts a different clientele. That's what it's about, about letting in a tattoo parlor or a burlesque club, something like that, not letting in a competitor to one of the existing tenants.

When Your Honor reads Mr. Aronoff's declaration or, sorry, his deposition transcript, rather, you'll see again and again examples that he just walked through of competitors existing within the Promenade shopping center. It's very common for competitors to exist in the same shopping center. That's not what tenant mix is about. It's about the nature of the center, the nature of the clientele.

Thank you very much.

THE COURT: Thank you.

Mr. LeHane.

MR. LeHANE: Thank you very much, Your Honor. I'll

try to be very brief.

First of all, co-existence does not mean successful co-existence. I think whatever may be happening elsewhere with Michaels and Hobby Lobby is irrelevant, right. And even the debtors' witness, Mr. Amendola, who by the way and I'd suggest that you look at it, he has no expertise in tenant mix and balance, limited familiarity with the concepts. But he admits that Michaels will have a negative impact on the Hobby Lobby lease sales and will have a negative impact on tenant mix and balance in the shopping center, right, so --

THE COURT: Well, didn't you say it might be initially negative and then it will be positive?

MR. LeHANE: Exactly. There will be a negative impact. And the statute doesn't say substantial. It says any impact. And even their witness admits that, and Jeff Aronoff who specializes in this absolutely states in his declaration that putting Hobby Lobby -- Michaels right next to Hobby Lobby in that portion of the shopping center will disrupt the tenant mix and balance in the shopping center. It's the debtors' burden to show there will be no disruption.

Mr. Fiedler and Mr. Hershey, with all due respect, are not experts in tenant mix and balance. The only witness we have heard that has any experience in tenant witness -- tenant mix and balance is Jeff Aronoff, Senior Vice-President of Brookfield Properties. And his declaration makes it absolutely

clear that there will be a disruption of tenant mix and balance in the shopping center. Thank you very much, Your Honor.

THE COURT: Thank you. I appreciate it.

All right. I think we're concluded with the Pinnacle's and Serramonte, and now we move on to Fountains. Is there a -- I mean I think probably it makes sense for Mr. Mairo to give his presentation and then we would go to your response. Does that make sense or do you want to go first? It's your motion.

MR. FIEDLER: It's fine if Mr. Mairo goes first.

THE COURT: Okay.

MR. MAIRO: Thank you, Your Honor.

For the record, John Mairo of Porzio Bromberg & Newman on behalf of the Landlord DPEG Fountains LP.

Your Honor, DPEG is pursuing its objection based on 365(b)(3)(C) grounds, the use exclusivity provisions of another lease in the Fountains shopping center would be breached. We're no longer pursuing a tenant mix/balance argument under 365(b)(3)(D). We have stipulated to certain facts and that will be getting sent to Your Honor within the next I think half hour.

And the Fountains lease is attached to the stipulated facts. And part of the stipulated facts is that the parties have agreed that the Fountains Center is a shopping center for purposes of 365. And we have stipulated, as well, that a true

and correct copy of the DPEG and Ross lease are attached to the objection that we filed that was at ECF 1344.

There has been a reference to Mr. Amendola's declaration being admitted into evidence. I do want to point out that his declaration does not state that he reviewed the DPEG-Ross lease, nor did Mr. Amendola speak to whether the use exclusivity provisions of the DPEG-Ross lease would be violated or breached.

DPEG contends that the debtors have not met their burden of showing adequate assurance. Your Honor, I view this as fairly straightforward. 365(b)(3)(C) is clear on its face. And the proposed assignment to Burlington must be shown to not breach any use or exclusivity provision in the DPEG-Ross lease which is another lease in the shopping center.

And the DPEG-Ross lease says, and this is at Section 15.3(a) that, "No tenant or occupant of the shopping center other than tenant may use" -- and then I'm skipping over some unnecessary language -- "use its premises for the off-price sale as hereinafter defined of merchandise or, B, use more than 10,000 square feet of leaseable floor area of its premises for the sale of apparel except for discount department store in excess of 85,000 square feet of leaseable floor area."

Then further on in that Section 15.3(a), Burlington is identified as an off-price retailer. And the Bed Bath lease that we're in question here to be assigned is for over 25,000

square feet. Obviously, much more than 10,000.

So on its face, the use exclusivity provision is getting breached violated. Then you go to subpart (b) in the Ross lease, Section 15(b), the exceptions. And, first of all, it says that the section is limited to tenants and occupants operating as of the effective date under the existing leases. But importantly, this section, 15.3(b), is different than the Serramonte-Ross lease which appears to extend exceptions to "any assignments or subleases of tenants on the effective date."

However, under the DPEG lease, the Ross-DPEG lease, even though Bed Bath was excepted as a current tenant, there is no language relating to assignments. So if Burlington violates or breaches the use exclusivity provisions, 15.3(b) does not except out Burlington. Accordingly, under Section 365(b)(3)(C), the assignment Burlington would breach the DPEG-Ross lease's use exclusivity provisions so the proposed assumption to Burlington must be denied.

Now a couple of other points, Your Honor, there was reference made at the outset about the Dhanani declaration, which is DPEG's declaration in support of its objection, being admitted into evidence, and that's at Document 1573 on the docket. Paragraphs 11 and 12 of that declaration, in Paragraph 11, it certified that it's his understanding, the declarant's, that the proposed assignment of the Bed Bath lease to

Burlington if approved would result in a violation of Section 15.3 of the Ross lease, which would expose DPEG to potential damages in the form of, A, termination of the Ross lease which has approximately 66 months remaining and approximate rent owed for that time period of over one and a half million dollars or, B, Ross would have the option of paying substituted rent of either its minimum rent or two percent of gross sales during the preceding month.

The point there, Your Honor, as has been talked about with respect to the Pinnacle lease, the landlord here could be exposed to significant claims from Ross. And the language of 365(b)(3)(C) talks about a breach. It doesn't talk about debtors' breach, landlord's breach, tenant's breach. It's just a breach of another lease. And I know there was a little disagreement on this side as to whether use exclusivity provision that is violated, would it be considered a breach.

Mr. Fiedler said the landlord would be breaching, not the debtor. Mr. Hershey said I'm not sure the landlord would. But neither of these folks are going to be the Court and be determining whether or not my client is going to be facing claims from Ross. And that ties in with something Mr. LeHane mentioned in terms of 363(e), adequate protection.

If this is going to be sold in some way, the leasehold interest, we need to be adequately protected. And that would be setting aside significant sums for the benefit of

my client to be able to protect itself against any type of claims that may be brought.

And the other paragraph I wanted to raise in the certification is Paragraph 12. Just that Ross has objected to the assignment of this lease to my client, has directed them to consider and to pursue an objection because of Section 15.3 of the lease.

I also want to just hit upon something that has been raised and Mr. LeHane covered this, as well. But there's been a fair amount of discussion in the papers as well as in oral argument about how on a certain level, like the sky is falling if Your Honor were to uphold these objections. Retail cases would end. It would turn the Bankruptcy Code on its head. It's just not true.

And as Mr. LeHane detailed, the Bed Bath case proves it. The enforcement of 365(b)(3) as argued by the landlords before you today will only impact three proposed assumptions, and the debtors have successfully assigned over I think I heard 125 shopping center leases. So applying 365(b)(3)(C) according to its terms which are clear, plain meaning, would not lead to absurd results.

Another point that was made is, oh, you're taking value potentially away from the estate if the objections are upheld. Well, look, maybe a little bit less would be paid by Burlington but, Your Honor, as Mr. LeHane said, that's all part

of the balance of the Bankruptcy Code. There are provisions that protect nondebtors.

And Burlington acknowledges in its pleading that price adjustments have already occurred to its bid. In Paragraph 2 of Burlington's reply which is at ECF 2058, Burlington admitted, "The debtors withdrew one lease from their bid package resulting in an adjustment to the purchase price." Presumably, a similar price adjustment would occur if the Fountain's lease was removed. Thus, the debtors' estate would still get the benefit of Burlington's bid for all the other leases.

And I guess I'll just close, Your Honor, with a point that I think I heard towards the end from Mr. Fiedler saying to the Court that it's not appropriate to rewrite leases. I would say my argument in sum is that it's not appropriate for this Court to rewrite the Bankruptcy Code, specifically Section 365(b)(3)(C).

THE COURT: Well, I guess I'm being asked to interpret what that other lease provision means, and that's where I'm having the issue. But also, on the adequate protection argument, if the lease is assigned subject to all its terms, the Bed Bath-Fountain's lease, then what else -- what other adequate protection would debtor be required to provide if the lease is being assigned subject to all its terms?

MR. MAIRO: I think the request would be to set aside money from that for some type of reserve to protect the landlords in the event they're faced with lawsuits from Ross.

THE COURT: To protect the landlord from the breach of its agreement with the third party that came after the debtors' Bed Bath and the landlord's lease was Bed Bath & Beyond.

MR. MAIRO: That would be right, Your Honor. But on a certain level, I also don't want to lose sight of the primary argument that in my view we don't even go there because a strict application of the Bankruptcy Code requires denial of the assignment.

THE COURT: Right. That argument I get. I totally get that.

MR. MAIRO: Thank you, Your Honor.

THE COURT: Thank you.

MR. FIEDLER: All right. Back again, Your Honor.

THE COURT: All right.

MR. FIEDLER: Just real quick, Your Honor, I did not hear anything in Mr. Mairo's recitation that would be different than the Pinnacle Hills' assignment or the Serramonte assignment. And so all the arguments previously made in support of the Michaels assignment I think apply equally to this assignment. I just want to correct --

THE COURT: Well, to be fair, I think what he's

saying is it doesn't have like the Pinnacle Hills-Bed Bath & Beyond lease, it doesn't have that out if you're contesting the assignment in good faith. Is that right or am I wrong on that, Mr. Mairo or no?

MR. MAIRO: I'm not aware of that provision, Your Honor.

THE COURT: Okay.

MR. FIEDLER: Okay. So just a few points, Your Honor. Mr. Mairo said I think that if the objection was sustained, Burlington would just pull it out and we'd still get the other leases. The estate's still going to lose money if that happens. There is almost $1.5 million at stake here. And so my question to Mr. Mairo and his client is at what point is the money to be gained by the estate not enough, right?

And so, yes, Burlington had 44 leases. One of those was pulled out because the lease was actually terminated, and Your Honor was made aware of that. But there is significant money at stake.

The second point refers to the first thing Mr. Mairo said I think was that Mr. Amendola didn't review the Fountains lease in his declaration, but in Paragraph 17 of his declaration, it makes clear that he did. And that says, "In reviewing the Fountain lease, I understand" and it continues on. But I'll turn just to the provisions of the Fountain lease itself.

Under 25(b) of the Fountains lease, the debtors are authorized to assign the lease for certain permitted uses. The Fountain leases further provides tenants, assignees, and sublessees shall be permitted to use the premises or applicable portion thereof for the uses permitted by Section 25. The prohibited uses in turn fail to prohibit the operation of the Fountains lease premises by Burlington. There's nothing in the Fountain lease that would prohibit Burlington from using that premises for its apparel operations.

And similar to the Pinnacle Hills violation, the landlord here is violating the warranties and representations that it made in the use of the premises by objecting to the assignment here.

Notwithstanding the fact that the Fountains lease expressly permits the assignment of the lease to Burlington, Fountains also alleges that the lease will violate exclusives and a non-debtor tenant lease in the non-debtor lease of Ross Stores. I think we made ourselves clear in the prior discussion with Pinnacle Hills that Bed Bath should not be bound by an exclusive in a lease to which it did not enter into and could not have possibly known about.

And so I think the lease expressly permits the use by Burlington. There's no exclusive within the lease that would prohibit the assignment to Burlington. And there is a provision in Section 23(d)(3) that talks about the future

exclusives and says that the lease provides that any future exclusive should not relate to the sale, rental or distribution of apparel or apparel accessories. And I think Burlington fits squarely within that definition of 23(d)(3) of the lease.

And so I think the lease expressly provides or permits for the assignment to Burlington. There's nothing in the lease that the landlord has pointed to that would say otherwise. And unless Your Honor has any questions, I think we'd rest on the argument we made in connection with the Pinnacle Hills assignment.

THE COURT: I think they're basically the same arguments except for these nuances, those details.

Mr. Mairo? Oh, I'm sorry, Burlington is -- I think Burlington didn't --

MR. JUNG: Good afternoon, Your Honor.

Wojciech Jung, Womble Bond Dickinson, on behalf of Burlington. Your Honor, the way we view the issues before Your Honor is that they are squarely legal issues and not so much factual issues. As Mr. Mairo said, we did enter into a stipulation that's probably being filed as I speak. But the issue, Your Honor, as I said is legal. Plenty of argument has been made by the debtors, by Michaels that are fully applicable to the leases that Burlington seeks to take over.

Your Honor, I would specifically address briefly issues raised by Mr. Mairo that Your Honor's ruling in the

landlord's favor would not disrupt the assignment and assumptions of leases in retail cases. And he specifically points to the fact that the debtor was successful in assuming and assigning many leases to prospective buyers, potential buyers, including Burlington.

But as Your Honor noted in other context, the meaning of that, if any, could be turned around. One could say that the other landlords subject to those leases did not take the absurd position that the two landlords are taking here, right. One could say they were rational. They did not fight the debtors' proposed assumptions because the law and the statute is quite clear.

The statute refers to the lease in question which is a debtor cannot be bound by a lease that it is not a party to. Any by analogy, Your Honor, there is plenty of case law in the context of claim objections related to rejection damages, for example, when a debtor rejects a lease. And when someone else files a rejection damage claim saying, hey, I was somehow impacted by the debtors' rejection of a third-party claim, courts clearly say that that party has no right to complain because it did not -- it is not, excuse me, a party to that lease.

And, Your Honor, that analogy I would suggest is squarely applicable here. So, Your Honor, for those reasons and incorporating arguments raised by Michaels and the debtors,

we would rest on the papers and request tat Your Honor --

THE COURT: I'm not sure I understood the last argument. Could you say --

MR. JUNG: I apologize?

THE COURT: The last argument, what was that? The one that you just made about --

MR. JUNG: With respect to --

THE COURT: The rejection.

MR. JUNG: Correct, Your Honor. There are instances where a debtor rejects a contract and a third party, another party to the contract files a claim before a bankruptcy court that's saying I was somehow impacted by the rejection of that contract and seeks whatever damages they would seek from the debtor.

And there are cases, there are plenty of cases that say that, sure, maybe you're somehow impacted by the debtors' rejection of a contract, but you have no reason to complain because you are not a party to that contract. The debtor has never contracted to protect you.

Your Honor, similarly, here I would say that the landlord assumes the risk when it enters into a contract that that contract may be assigned to someone else. And the only meaningful way to protect itself in that situation is to expressly contract or enter into provisions and agreements in a contract that prevents or prohibits the tenant from assuming a

contract to a party the landlord may not find acceptable.

Thank you, Your Honor.

THE COURT: Thank you.

Mr. Mairo, do you have any rebuttal?

MR. MAIRO: Thank you, Your Honor.

John Mairo for the record.

If I heard Mr. Jung correctly, I think he's on some level characterized our arguments as absurd and irrational. I completely disagree. I don't understand --

THE COURT: No, I'm not finding any arguments are absurd or irrational. For example, I don't know out of the other landlords' leases that were assumed and assigned whether parties had potential objections or didn't have them. So I don't know how I can as to the use. So I don't know how I can give that any weight one way or the other. It just doesn't seem to -- it's just not something that is a fact in this case. It's just not here. So I'm not going to --

MR. MAIRO: Fair enough, Your Honor.

THE COURT: I'm not going to consider that either way.

MR. MAIRO: Thank you, Your Honor. Again, and certainly we view it as just a strict application of the Bankruptcy Code.

And I wanted to just hit upon something that Mr. Fiedler mentioned in terms of Mr. Amendola's declaration. He

does not reference the DPEG-Ross lease. In Paragraph 5, he describes reviewing the leases of Bed Bath & Beyond's leases with the leases that are considered to be assumed and assigned. And then Paragraph 17 that Mr. Fiedler referenced is not the DPEG-Ross lease. That's again the Bed Bath-Fountains lease.

So I just wanted to be clear that Mr. Amendola's declaration he does not say he reviewed the Ross-DPEG lease, he does not reference it in Paragraph 17. And it is the debtors' burden to establish adequate assurance. And I don't believe they have, Your Honor.

THE COURT: Well, there's no dispute that the Fountains lease with Ross prohibits the Burlington use, right?

MR. MAIRO: I agree.

THE COURT: So, in contrast, that is something that's in the record.

MR. MAIRO: Thank you, Your Honor.

THE COURT: Thank you.

All right. That's it for the presentations I guess. And it's 1:00, so that's a good time to break. I need to digest all this, and I know there's time pressures involved in the sense that there's -- well, this is -- I think the landlords were gracious in saying no rent during this period from July 31st to August 31st while this gets decided. I don't know if it goes beyond that, but I would like to decide this today but I may need some time.

And I was wondering whether -- I mean there's a lot of parties here that are very -- that are charging the estate or charging their clients. And it's going to be a couple of hours at least or sometime later this afternoon. So if the parties want to go back to their offices and work on other things or limit the time for now and I'll go bank on the record and I anticipate being able to read my decision into the record later on, although with today's technology, maybe you can work from here and it doesn't really matter. But I give you that option.

MR. FIEDLER: I just want to make one note, Your Honor. While Mr. LeHane's clients have agreed to waive obligations for September, the same is not true for the Fountains landlord. And I think it's our position that any obligation for rent in September would not be required from the debtors. And to the extent Your Honor were to rule in their favor, there will just be a lease termination or rejection as of the end of this month.

THE COURT: In other words, another reason for me to decide today.

MR. FIEDLER: I don't want to put pressure on you.

THE COURT: No. That's all right. I can handle it.

MR. FIELDER: All right. Thank you, Your Honor.

MR. HERSHEY: Sam Hershey from White & Case, Your Honor, for Michaels. If Your Honor wants counsel to stay,

we're certainly happy to. Otherwise, I think at least the White & Case team are based in New York and we would return to the office and join virtually when Your Honor reads your ruling. Whatever Your Honor prefers, of course.

THE COURT: I have no preference. I'm just going to --

MR. HERSHEY: I think that's what we'll do, Your Honor.

THE COURT: I was just offering it to you as a way to hopefully limit the expense to -- because, like I say, it could be --a few hours, you know.

MR. HERSHEY: And that's our goal too is to limit the expense. That's what we'll do. We'll join virtually later whenever Your Honor is ready to read the ruling.

THE COURT: All right.

MR. HERSHEY: Thank you very much.

THE COURT: And otherwise, we'll make -- you know what, and then I was just thinking of another alternative, Juan, is that we could also make conference rooms available to the parties. They can go there.

MR. FIEDLER: Your Honor, does it make sense to maybe set a time later for today to put forth a conference call available for folks that aren't going to be joining in the courtroom or does it make sense for everyone to join via Zoom at that time?

THE COURT: I think since everybody's been doing it by Zoom all along, I think we should continue the Zoom.

MR. FIEDLER: Okay.

THE COURT: Those kinds of issues are not my forte.

MR. FIEDLER: Yeah, yeah, yeah. I understand. That's on us.

THE COURT: I'm fine with people appearing by Zoom, appearing in person. What I do know is that Court Solutions and Zoom doesn't usually work, so it's going to be Zoom or in person.

MR. FIEDLER: Okay. Yeah, I've experienced that before, by the way.

THE COURT: All right.

MR. FIEDLER: All right. Thank you, Your Honor.

THE COURT: Thank you.

All right. Thank you for all the professionalism, and really exceptional presentations. You make my decision a difficult one, but that's what I have to do and I'm going to -- I have every intent of deciding today, okay.

Thank you very much.

MULTIPLE COUNSEL: Thank you, Your Honor.

THE COURT: Thank you. Bye bye.

(Recess at 1:02 p.m./Reconvened at 5:25 p.m.)

THE COURT: Okay. We're back on the record in the Bed Bath & Beyond case, 23-13359. We had a hearing this

morning at which certain evidence was admitted into the record. I'll describe it in more detail in a few moments. But basically, there were stipulations, there were deposition transcripts that were admitted in excerpts. And there were also declarations that were admitted. However, there was no testimony. And there was extensive argument.

So before the Court today are the objections filed by three landlords to the motion of the debtors here, Bed Bath & Beyond, Inc., and its affiliated entities, we'll collectively call them the debtors, to the assignment of certain leases by the debtors. Two of the leases are intended to be assigned to Burlington Stores, and those assignments are opposed by the Daly City Serramonte Center, which I'll call Serramonte, and Landlord DPEG Fountains, LP. We'll call them Fountains.

The third is intended to be assigned to Michaels Stores, and that assignment is opposed by the Landlord Pinnacle Hills, LLC, Pinnacle we'll call them, and collectively the objecting landlords. The objections are based primarily on or really exclusively on 11 U.S.C. 365(b)(3)(C) and (D) which apply to shopping centers and are referred to as the use, restrictive use and tenant mix and balance provisions.

There has been extensive briefing on the issues before the Court including the following papers. As to the Pinnacle proposed assignment with Michaels as the proposed assignee, is Document 1323, an objection to the assignment

filed by Pinnacle on 7/12; Document 1383, a response by Michaels filed on 7/17; Document 1926, a surreply by Pinnacle filed on August 18th and supported by the declarations of Jeffrey Aronoff at 1927 and Kristin S. Elliott at 1928.

Document 2059 was a further reply by Michaels filed on August 25th. Document 2062 was an omnibus response by the debtor filed on 8/25 and supported by the declaration of Emilio Amendola, Document 2062-1.

As to the Serramonte lease, which is the proposed assignee as Burlington, there was Document 1388, a limited objection filed by the Landlord Serramonte on 7/12. And on August 18th, a supplemental objection was filed by Daly City Serramonte at 1929 and supported by the declaration of Ernst Bell. And then there was a Burlington omnibus reply filed on 8/25, Document 2058, and the omnibus response by the debtor on 8/25, as I noted at 2062 and 2062-1. There also was a stipulation of undisputed facts at Docket 2087.

And then, finally, as to the Fountains lease, and the assignee again proposed is Burlington, Document 1933; a supplemental objection by Fountains and a joinder in Pinnacle's opposition to the Michaels arguments; Document 1573, a certification of Nikhil Dhanani, filed by Fountains. The Burlington omnibus reply at 2058, and the debtors' omnibus reply at 2062 and 2062-1.

As I noted briefly earlier, the Court scheduled an

evidentiary hearing on these motions for today, but the need for live testimony was obviated by the parties' agreement to admit into evidence the direct testimony contained in each of the declarations described above. In addition, the parties agreed to admit into evidence in lieu of cross-examination certain excerpted portions of the depositions of Mr. Aronoff and Mr. Amendola. And then, finally, as noted, the debtor and the Serramonte landlord and the debtor and the Fountain landlord submitted stipulations today.

The Court admits each of these documents into evidence. As a result, today's hearing consisted entirely of the arguments of counsel as well as the admission of those documents.

By way of background, the debtors filed these cases under Chapter 11 for reorganization on April 23rd, 2023. The debtors have indicated a primary focus in this case has been to maximize the value of its assets for all stakeholders including through the sale of its below-market leases which is also referred to as lease optimization efforts. These efforts included conducting Phase I and Phase II Lease auctions.

Numerous objections were filed to those proposed assumptions and assignments. The objections were based on cure costs and adequate assurance, also, the debtors' financial ability to perform. And those objections were largely or completely resolved. There were also other objections based on

those issues, as well as tenant mix and exclusivity provisions.

Most of those as far as this Court knows have also been resolved, although I'm not 100 percent sure which way they've all been resolved. I assume some resulted in withdrawal of the leases from the motion and some were in connection with withdrawal of the objections. That said, the objections that are the focus of today's hearing relate exclusively to the tenant mix and exclusive use provisions in the leases and only those grounds, 365(b)(3)(C) and (D), as acknowledged by the parties.

This Court has jurisdiction over this matter under 28 U.S.C. 1334(b), and the standing orders of reference entered by the District Court for New Jersey on July 10th, 1984, as amended on September 18th, 2012. This is a core proceeding under 28 U.S.C. 157(b)(2)(A) and (O). Venue is proper in this Court under 28 U.S.C. 1408.

The Court issues the following findings of fact and conclusions of law pursuant to Federal Rule of Bankruptcy Procedure 7052. To the extent any of the findings of fact might constitute conclusions of law, they're adopted as such, and the reverse is also true.

The applicable law under 365(f)(2)(B), a trustee or debtor in possession that seeks to assign an unexpired lease to provide adequate assurance of future performance by the assignee. Section 365(b)(3) then defines what adequate

assurance of future performance means in the context of a lease in a shopping center.

Section 365(b)(3) of the Bankruptcy Code has four subsections applicable to shopping centers including (C) and (D) which as noted are at issue today. Subsection (C) requires adequate assurance that "assumption or assignment of such a lease is subject to all the provisions thereof, including but not limited to provisions such as a radius, location, use, or exclusivity provision and will not breach any provision contained in any other lease, financing agreement, or master agreement relating to such shopping center."

That's (C), and the focus there is in any other lease relating to such shopping center. And subsection (D) requires adequate assurance that assumption or assignment of such lease will not disrupt any tenant mix or balance in such shopping center. That's 11 U.S.C. 365(3)(D).

Shopping centers are not defined by the Bankruptcy Code, but here they are defined by the lease between Bed Bath & Beyond and Pinnacle, the landlord. And Section 1134 of the lease provides that the shopping center known as Pinnacle Hills Promenade located in Rogers, Arkansas, the shopping center consists of two retail shopping centers which shall be operated as a single operating -- single integrated shopping center.

So there was some dispute today that frankly caught the Court a bit by surprise as to whether the shopping center

consisted of the integrated shopping center known as the Promenade, Pinnacle Hills Promenade, which consists of over 100 stores, or what was so-called Power Center which includes just 12 stores but may be defined as big box retailers that include the lease with Bed Bath & Beyond that is sought to be assigned to Michaels as well as the leases with Dollar Tree and Hobby Lobby. They're all in the Power Center.

I'm going to go by the lease and find that the shopping center consists of the two shopping centers that are operated as a single integrated shopping center. So that is the Court's holding on that point, which is based on the agreement of the parties and is pretty clear to me.

Based on the pre-hearing briefing and evidence and argument presented today, the Court is convinced that the objections under 365(b)(3)(C) and (D) could be resolved as a matter of law as was suggested by certain of the parties. But the Court will first address the legal issues which largely overlap and also Fountains and Serramonte both expressly joined in the Pinnacle surreply. And then the Court will address the certain factual issues under 365(b)(3)(D) in the alternative.

The landlord's primary argument under 365(b)(3)(C) is that the assignments to Michaels and Burlington as proposed should be prohibited because the addition of those stores to the shopping malls would violate the exclusive use provisions the objecting landlords have granted in leases entered into

subsequent to the leases with the debtors and in some cases, in most cases, more than ten years after the lease with Bed Bath & Beyond.

But as to the plain language, the Supreme Court has instructed that when the meaning of the statute is plain, the Court's inquiry and there, that's Bostock v Clayton County, Georgia, 141 S.Ct. 1731, 1749. The Third Circuit feels the same way. Burton v. Schamp, for example, 25 F.4th 198, 207 (3d Cir. 2022), quoting, "As always statutory interpretation begins with an examination of the statute's plain language."

Accordingly, this Court turns first to the disputed phrase provision in 365(b)(3)(C) that states that the assignment proposed will not breach any radius, location, use, or exclusivity provision in "any other lease, financing agreement, or master agreement in such shopping center relating to such shopping center."

There are no temporal or other restrictions on this phrase, thus, the objecting landlords argue that that should be the end of the analysis. In other words, a proposed assignment must not breach any other lease, with emphasis on the word "any," a landlord may have entered into with respect to the subject shopping center including those such as the ones Pinnacle has with Hobby Lobby and Dollar Tree and the other leases relating to the Serramonte and Fountains shopping center, all of which were entered into years after the Bed Bath

& Beyond lease.

In the case of the Hobby Lobby and Dollar Tree lease, they were more than a decade after the debtors' lease, 14 years as to Hobby Lobby and 12 as to the debtor -- as to Dollar Store. The same is generally true as to the lease with the Serramonte which was entered into about three years before and with Ross and the one with Ross and Fountains which was also many years, entered into many years after the BBB lease.

And the Court acknowledges that there is appeal to the plain language argument, and it is frankly one that I struggled with. But I don't believe that the plain language canon or principle is the only one that is at play here for various reasons, which I will describe. The Court will also consider Supreme Court precedent that holds the plain meaning of legislation should be conclusive except in rare cases in which the literal application of the statute would --

UNIDENTIFIED SPEAKER: (Indiscernible). I don't think so.

THE COURT: I'm sorry.

UNIDENTIFIED SPEAKER: I'm not --

THE COURT: Hello?

I'm just going to continue. The literal application of the statute will produce a result demonstrably at odds with the intentions of its drafters. Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571. This Court finds that

this is one of those rare cases where a strictly literal application of the phrase "any other lease" in 365(b)(3)(C) would be at odds with the intentions of the drafters of 365.

The Court also will consider the related principle of statutory interpretation that the provisions of the statute must be read in the context of the statutory scheme as a whole. Gundy v. United States, 139 S.Ct. 2116, 2126 (2019). Statutory interpretation is a holistic endeavor which determines meaning by looking not to isolates words but to text and context along with purpose and history.

When those canons of statutory construction are applied, it becomes clear to the Court that the phrase "any other lease" could not have been intended and was not intended to mean a subsequent lease between a landlord and a third party as to which the debtor was not a party.

As the District Court for the Southern District of New York persuasively explained in the Sears case, the provisions of 365(b) must be read in harmony with 365(f)(2)(B), Sears Holding Corp, 613 B.R. 51,68 (S.D.N.Y. 2020).

That court relied extensively on the Ames Department Store cases in the Bankruptcy Court for the Southern District of New York where the Ames court noted that subject only to certain statutory safeguards, the value of the debtors' leases should go to the debtors' creditors and that leases can be sold to that end with or without the landlord's consent. Ames

Department Stores, 348 B.R. 91,98 (Bankr. S.D.N.Y. 2006). The Ames cases were the earlier cases that Judge McMahon relied on.

As the Burlington Stores' objection notes, the landlords, the proposed interpretation turns 365(b)(3)(C) and (D) into a sword rather than a shield, a sword that bestows upon the landlords a commercially competitive advantage that actually allows them to improve their position to the detriment of the debtors' estate.

And that is because applying the plain language argument here would mean that the debtors are bound by restrictive use and similar provisions in any other leases that were entered into after the Bed Bath & Beyond leases, in these cases, often more than a decade later, and make the broad assignment provisions negotiated for by BBB unenforceable based on the landlords' agreement with a third party that the debtor never knew about or much less agreed to.

And it would also violate the provisions in the BBB lease that say that BBB is not required to honor any exclusive subsequently given by the landlord. Thus, the ability of debtors to maximize the proceeds from their leases would or could be severely curtailed by landlords' agreement with other tenants to limit the uses for which the BBB premises were expressly allowed to be used without BBB, Bed Bath & Beyond agreeing to those terms.

The landlords would be permitted to eviscerate the

debtors' negotiated bargain, a broad assignment provision, by subsequently entering into an agreement with any third party in the same shopping center that restricts uses that Bed Bath & Beyond was expressly permitted to have under their lease. That would seriously limit BBB's assignment's rights without its knowledge or consent. And this frankly makes no sense to the Court, especially in light of the legislative history that I will also discuss.

The House Report from when the Modern Bankruptcy Code was enacted in 1978 in discussing the shopping mall protections in 365 states that, "To assure the landlord of his bargains for exchange, the court would have to consider factors such as the nature of the business to be conducted by the trustee or his assignee whether that business complies with the requirements of any master agreement and whether the business proposed to be conducted would result in a breach of other clauses and master agreements relating, for example, to tenant mix and location as per House Report 95-595 at 348-349, 1978 U.S.C.C.A.N. 5963,6305."

It just demonstrates that from the very beginning, the focus was on a landlord's bargain for his rights with the debtor, not with the third parties, including things like master agreements to which the debtor would be the party. Then, in 1984 when Congress decided to enhance or reduce any confusion or lack of clarity in 365(b)(3), the legislative

history makes plain that Congress's purpose was to ensure that "the lessor and the other tenants maintain the benefit of the original bargain with the debtor."

Later when -- that's Senate Report No. 65, 98th Cong., 166 1ST Sess. 67-68 (1983). And I emphasize original bargain with the debtor. Later, when changes were made to the 365 by BAPCPA, Senator Hatch stated, "The bill helped clarify that an owner should be able to attain control over the mix of retail uses in the shopping center. When an owner enters into a use clause with a retail tenant forbidding assignments of the lease for a use different than that specified in the lease, the clause should be honored." 151 Cong. Rec. S. 2455-2361 (March 10, 2005).

In this case, it is acknowledged by all that the leases at issue do not contain a use clause that would forbid the proposed assignments to Michaels or Burlington.

In response, the objecting landlords point to a portion of the legislative history that states that Section (b)(3) provides that in lease situations common to shopping centers, protections must be provided for the lessor if the trustee assumes the lease, including protecting against a decline in percentage rents, breach of agreements with other tenants, and preservation of tenant mix.

In this Court's view, that statement is not consistent with those already cited. The phrase "breach of

agreements with other tenants" must be understood to mean breach of agreements with other tenants that were in existence at the time the debtor entered into the lease and would either be incorporated into the lease or part of an agreement or part of a master agreement, not subsequently entered into leases that the debtor had no knowledge of or agreed to.

Any other interpretation would expand the rights of a shopping center landlord outside of bankruptcy result which has been virtually as far as this Court knows universally rejected in the case law. See, for example, Great Atlantic & Pacific Tea Company, Inc., 472 B.R. 666-675 (S.D.N.Y. 2012).

Section 365 does not give the landlord the right to improve its position on the bankruptcy of the tenant. In re Sears Holding, 613 B.R. 51,70 (S.D.N.Y. 2020).

The Bankruptcy Code cannot be read to place the landlord in a better position than it would have been absent the bankruptcy. And also, as the Third Circuit noted in the Joshua Slocum case, Congress has suggested that the modification of a contracting party's rights is not to be taken lightly, 922 F.2d. 1081 at 1091 (3d Cir. 1990). At the same time, the Joshua Slocum court noted that the non-debtor party, here the landlord, that the policy is to require that the non-debtor party receive the full benefit of his bargain.

Further, the language that is at issue here as to not breaching any provision contained in any other lease, the

argument is made by the debtor and Michaels and also Burlington is that a debtor can't breach a contract to which it's a party. Pinnacle's lease with Hobby Lobby, for example, provides that is to be governed by the laws of Arkansas, and Arkansas law provides that before a contractual provision can be enforced, there must be privity of contract between the parties.

There was no privity of contract between Bed Bath & Beyond and Hobby Lobby or Dollar Tree. In each instance, Bed Bath & Beyond's lease precluded those leases in time, and there was no provision in the Bed Bath & Beyond lease that made it subject to future lease restrictions. In fact, the exact opposite is true. Section 13.3.2 of the June 1st, 2007 lease between Pinnacle and Bed Bath & Beyond states that, "Except as expressly set forth in this Section 3.3, tenant shall not be obligated to honor any exclusive granted to landlord in any shopping center."

The objecting landlord's reading of the statute would also write that "bargain for" provision our of the BBB lease and that, as noted, is not what was intended according to the legislative history, as cited above. It would also give the landlord extra unbargained for rights by actually breaching the lease with the debtor. And I just can't find that that's what Congress intended. It just doesn't make sense to me.

And by reading the statute in this way and in harmony, what I'm saying is that you start out with 365(b) and

its focus is on the lease with the debtor and the landlord. And that's where it all derives from. And then that's the context. And then if you read it the way I think it is intended is that it wouldn't read the words out of the statute.

It would just say that, for example, it would be enforced where the lease was subject to a master lease agreement that said the lease -- the proposed use was prohibited or a reciprocal easement agreement as in the Three A's case that was in place before the tenant agreed to lease the premises, or a financing agreement that was recorded and which the tenant knew about and agreed to or acknowledged or consented to in advance.

None of those things are here, but it would allow for the enforcement of the restrictive use provisions in many many cases, and this Court dares to say in cases where that's what was intended and that was what was bargained for by the party. And so, by this reading and I believe I am harmonizing the legitimate commercial expectations of the debtor, the landlord, and other tenants and Congress in enacting 365(b)(3)(C).

Outside of bankruptcy, the tenant such as Hobby Lobby could not have expected that the provisions of his lease would supersede provisions in existing tenant lease that was entered into 14 years before. And then that gets into the other issue where the landlord candidly acknowledges that you can't enforce -- that there's a provision in the leases that allows the

landlord to terminate the lease in the event of an assignment that it does not approve of.

But as the landlords also candidly and forthrightly acknowledged, that kind of provision would not be enforceable in the bankruptcy court. So that kind of provision would not be enforceable, and we're left with the provisions that allow for the assignment to virtually any -- for any use that's not prohibited by law, essentially.

All that said, and as the landlords point out, there's no binding precedent in this jurisdiction, as neither the Third Circuit nor the Supreme Court has ruled on this precise issue. In a case from another jurisdiction that has been heavily discussed here and factually nearly identical, it's very rare that there's a virtually identical case, but the Toys "R" Us case is one, 587 B.R. 304.

It even involved a Ross lease that was a lease with Toys "R" Us that was proposed to be assigned to a Burlington and that they would have been adjacent to each other. And the court allowed that assignment that was alleged to violate the exclusive use provisions of another lease that was entered into many years after the subject lease with the debtor and that was sought to be assigned.

The Court specifically found that the cases cited by landlord did not support its plain language argument argument, although I'll admit there wasn't a long discussion on that.

That's at 310. Nonetheless, Pinnacle urges the Court not to follow Toys, arguing that it was wrongly decided because it did not examine the plain meaning of the statute and relied on dicta from the Fourth Circuit's Trak Auto opinion.

The Court is not persuaded by that argument because this Court's own examination of the plain meaning of the statute led it to the same conclusion. And I will note that that conclusion that it doesn't violate the plain language of the statute was at least tacitly and preliminarily adopted by the district court in the Toys "R" Us case when it refused to grant the landlord a stay pending appeal of the Toys "R" Us decision because the landlord could not show a likelihood of success on the merits based on, among other things, the plain language argument. That's Brea Union Plaza I, LLC v. Toys "R" Us, 2018 Lexis 123049*3 (E.D.Va. 2018).

Pinnacle would suggest that this Court should follow the guidance in the Sears Holding Corp case, 613 B.R. 5172, a case that was referred to earlier. That case, though, addressed 365(b)(3)(A) and (D) rather than (C), but the rationale behind that ruling and particularly that 365(b) should be read in harmony with 365(f) actually cuts in favor of this Court's ruling today because it's a holistic analysis and that 365(f) refers to the lease with the debtor and so does the beginning of 365.

There's also the argument that there will be harm to

the landlords because there will be rent abatements with Hobby Lobby and Dollar Tree and also with the other stores in the Fountains and Serramonte malls. The Court also disagrees with that argument because at least certainly in the case of the Pinnacle lease, Section 7.4 provides that any use which would otherwise violate a tenant's exclusive shall not be allowed to continue for any assignment unless landlord does not have a right to approve such assignment. Here, it is the bankruptcy court and not the landlord that has a right to approve the assignment.

Similarly, Section 7.5 of the Hobby Lobby lease provides that a tenant shall not be entitled to abatement and rent if the landlord promptly initiates and diligently pursues all commercially reasonable remedies including without limitation legal action for final approval. Here, Pinnacle promptly initiated and is diligently pursuing its objection to the proposed assignment. It's acting in accordance with the lease by bringing the issue before the Court and allowing the Court to decide if the assignment violates the Bankruptcy Code.

And as the Toys "R" Us and Martin Store courts observed, the assumption and assignment of the lease is a judicial action that may render the landlord unable to comply with the restriction contained in another lease and the law would excuse performance that has been rendered legally impossible or -- that's 199 B.R. 265. Or similarly, that

provision 7.5 says that the rent isn't going to be abated as long as the landlord proceeds with the objection.

And so, similarly, the Toys "R" Us court alternatively found that the assignment would not breach the exclusivity provision because the Court's order would render the landlord without the capacity to prevent Burlington's intended use which was based on the lease with Ross Stores that only applied if the landlord had the capacity to prevent a tenant from selling off-price apparel.

And then I also have to note the use of the word "violation" rather than breach, and I think this lease is a very heavily negotiated document and by extremely sophisticated attorneys that, whether it's 2007 or 2019 or 2021, had the Bankruptcy Code and the related assignment provisions in mind when it was drafted. And a violation is not necessarily a breach as is particularly true in this case with 7.5 because as I understand the lease and as I read the lease, it couldn't be terminated and there wouldn't be any rent abatement as long as the landlord is diligently prosecuting the objection.

So then I also note that the Fountains landlord makes a similar argument that it could be exposed to substantial damages pursuant to its lease with Ross, but that 15.3(a) of the Ross-Fountains lease provides that landlord, if it had the capacity to do so, shall not permit any other tenant or occupant of the shopping center to use its premises for the

off-price sale of merchandise.

So the damages arguments appear to be possibly illusory or, alternatively, I would say the one thing that's clear is that the landlord had knowledge of the Hobby Lobby broad assignment provisions when it entered into these leases. And whether it was to entice the new tenants to enter into the lease or it was just part of the whole negotiating process, what ended up happening was that the landlord gave the exclusive use provisions to the other tenants without getting BBB's consent, without modifying BBB's lease, without BBB even having knowledge of the use restrictions.

And I also adopt the argument of the debtors and the tenants that -- the proposed tenants that the damages, if any, and this is what I was getting at, are the result of the landlord's actions that it undertook knowingly in violation of not only the assignment provisions of the Bed Bath & Beyond lease but also the provision that says that they're not going to be bound by any exclusive, yet the landlords are seeking to enforce exclusives of the other tenants.

I'm going to find then that I'm not required to reject the proposed assignments based on the plain language of 365(b)(3) for all those reasons. But even in the alternative, even if I were to give effect, full effect to the landlord's plain language argument, the proposed assignments to Michaels and Burlington that I noted here would not result in a breach

at all as the lease will continue and the landlord did what it was supposed to do to make it continue.

And I'm also reading 365(b)(3)(C) in a manner that places in context with the rest of 365 and allows the landlord to the full benefit of what it bargained for and allows the tenant, debtor tenant to maximize its recovery when it's legally permissive to do so and doesn't effectively not only provide greater rights to the landlord than are available outside of bankruptcy, but also would allow the landlord to breach the lease and specifically the provision that allows -- that says that it's not bound by future exclusives and then benefit from that breach.

So it respects the rights, this interpretation respects the rights of both parties but doesn't eviscerate any clause at all. What it does is I believe interpret it in a way that was intended by the legislature and the cases that construe it including the very thorough and persuasive opinion of Judge McMahon in the Sears case.

So on all those grounds, whether it's because it would lead to a result that was never intended as in the case before the Court here or whether on the basis that you read the statute in context or also on the basis that even if you read it the way the landlords are asking, there is no breach of the lease because the debtor was not party to it and the debtor was not party to it. And if there was a breach -- well, not party

to it and also the lease itself provides that there's no rent abatement or other damages recoverable in that instance.

So I am going to reject the 365(b)(3)(C) arguments as for the reasons described.

Subsection (D), turning to that now, requires adequate assurance that assumption or assignment of such lease will not disrupt any tenant mix or balance in the shopping center. That's (3)(D). On this issue, the objecting landlord's arguments is that allowing Michaels and Burlington into the shopping centers is unacceptable because they are direct competitors of other tenants such as Hobby Lobby, Dollar Tree, and Ross/Dress For Less. In fact, some of the leases specifically name these proposed assignees.

Oh, I should note here also that Fountains at this point indicated that it was not pursuing the 365(b)(3)(D) argument, so it just applies to the Pinnacle and Serramonte stores.

And while it is undeniably debtors' burden to demonstrate adequate assurance under 365(f), in the case of the tenant mix, that burden arises -- before that burden arises, "The burden is on the landlord to establish the existence of an intended tenant mix, and that requires more than simply demonstrating that it has provided each of its tenants with exclusivity provisions." In re Toys "R" Us, 598 B.R. 233, 242.

As the district court found in the Lasalle-Trak Auto

case, "As a predicate to a finding that a shopping center is entitled to protection under 365(b)(3)(D), the lessor must demonstrate that there was an intended tenant mix in the first instance. Intent to create a diverse tenant mix must be established in light of the lease terms. In order to establish that the proposed assignment" -- omitting a word or two there -- "would disturb the tenant mix of the shopping center -- In order to establish that the proposed assignment would have disturbed a tenant mix of the shopping center, the landlord must establish that the tenant mix was part of its bargained-for exchanged in its lease and leases with the other tenants." Lasalle v. Trak Auto, 288 B.R. 114,125 (E.D.Va. 2003) Also Toys "R" Us Property Co I, 2019 WL *6 (E.D.Va. February 11, 2019).

Here, as noted, the debtors had a virtually unrestricted right to use the premises for any lawful purpose which would include arts and crafts stores or discount apparel stores. Then, the Court further notes that tenant mix or balance is not defined in the Bankruptcy Code, but the Court agrees with the reasoning in Sears where the Court in a very detailed and well-reasoned opinion found that given the lack of any statutory definition for the words "tenant mix" and the several possibilities for what it might mean, it makes perfect sense to interpret the phrase "tenant mix" for the purposes of 365(b)(3)(D) in light of the lease whose performance is being

assured because the tenancy governed by that lease is part of the tenant mix at the shopping center. Sears 613 B.R. 68.

And here, I'm going to adopt the -- and really, in total, the district court's reasoning at Pages 65 to 71 where the court discussed in great detail the legal basis for that interpretation in light of the case law, in light of legislative history, in light of principles of statutory construction. And although the case is relied upon by the landlords for the (A) portion and the (A) discussion, I find the (D) discussion to be of particular relevance not only here but also in the case of -- I'm sorry, I need to get the case here -- in the case of the analysis for (3)(C), by analogy, because it does require a focus on the lease at issue.

And that court, I'll just note in its conclusion after that lengthy and detailed analysis, concluded as follows: "The bankruptcy court cannot be read to place the landlord in a better position than it would have occupied absent the bankruptcy." That's the Great Atlantic & Pacific Tea Company case, 472 B.R. 675.

And then quoting from that case, "Section 365 does not give a landlord the right to improve its position upon the bankruptcy of the tenant. The statute affords no relief to a landlord simply because it might seek to escape a bargain it made, quoting Rock 49th Restaurant case.

So then the court then concludes in support of the

argument and the words that the tenant mix will not be disrupted, that must be read to guarantee the preservation of the very businesses or at least the same type and number of businesses that were resident in the mall just before Sears declared bankruptcy. And then it went on to distinguish the Federated case which I agree with that is a distinguishing factor, also.

So I think as a matter of law, I need to look at the lease again between Bed Bath & Beyond and the respective landlords. And in none of those leases was any of these uses prohibited. So the landlords didn't care to negotiate that in or weren't able to negotiate that into the leases when they entered into the lease with Bed Bath & Beyond. And maybe that was because Bed Bath & Beyond wouldn't agree to it without it. And so then to allow the landlord to just get out of that provision because the debtor filed bankruptcy just does not make sense to this Court.

So I think in that context, I don't really need to look at other -- and especially in the context of the entire shopping center. When you look at the lease, the lease, these uses are permitted, so why would that result in a disruption in the tenant mix and balance as was contemplated by Congress and the case law in light of the agreement between the parties, the landlord and the tenant?

At the hearing on August 30th, the parties stipulated

to asserted facts and also the leases were all stipulated into evidence. No one pointed out in those leases where the tenant mix was subject to a master lease or some particular tenant mix that the debtor agreed to. In fact, the opposite is true is that the landlord granted Bed Bath & Beyond very broad rights to assign the lease and, in fact, did not require it to honor any exclusives.

So the tenant mix could have been affected by that because it wasn't required to honor any exclusives, but that was the deal. And to give the landlord more rights than it would have outside of the bankruptcy again is inconsistent for the reasons stated.

So, again, I think I can decide that as a matter of law. But to the extent that we need to get into facts, the Court finds that the evidence falls short of establishing that the existing tenant mix is going to be disrupted in the shopping center as opposed to the Power Center. The only evidence that was submitted in Mr. Aronoff's certification says, "The contractual use, exclusive use, and assignment provisions of the leases of the various tenants of the Power Center including the Hobby Lobby lease, the BBY lease, and the Dollar Tree lease allow landlord to control the tenant mix and balance at the Power Center and the Promenade."

He had to limit it to the Power Center to even make that statement. But as the Court previously found, the

shopping center includes the 100-plus stores and the two stores that -- the two arts and crafts stores that will be there are two out of a hundred. And they are very close to each other, but to the extent again I have to consider facts and this goes to the Elliott certification and the -- I'm not sure where it stands on the Power certification.

But the Elliott certification makes clear that there are plenty of places in the country where Michaels and Hobby Lobby co-exist and where also the other proof about it that Ross and Burlington co-exist in various places. But I think that gives further support to you have to look at the agreement between the two key parties' argument because it is a function of the individual leases.

In some places, the Michaels and the Hobby Lobby at least two are right next to each other. So in those cases, that did not obviously by definition disrupt the tenant mix and balance because they're there together. And there's plenty of other instances where even taking away the ones as to which there's some question, there are a few stores away in the same center.

So that's why you have to look at the agreement between the parties, and whether it was for whatever reasons the parties agreed that Bed Bath & Beyond could assign to essentially whomever it wanted, that to me means that the tenant mix was not that important because you could assign to

anyone who wasn't operating something illegal or a tattoo parlor or something like that.

And, further, there is an indication that there would be some possible diminishment in traffic at the Hobby Lobby store, for example, when the Michaels first opens. But then that there might be beneficial synergies to that. I don't know. I'm not an expert in that, but that also seems to make sense to me.

And in any event, I don't find that the landlords met their initial burden as to the mix. But even considering the facts that were provided in the context of the lease, I can't find that there was a disruption of the tenant mix and balance as contemplated by 365(b)(3)(D).

So that's the Court's ruling. I'm going to allow the assignment subject to all the terms of the leases including whatever restrictions there might be and whatever the terms are, they are. There's no change in any of the terms. It's just being assigned exactly as it was or as is. So that's the Court's ruling.

MR. LeHANE: Your Honor, Robert LeHane for the record, Kelley Drye & Warren, on behalf of the Pinnacle landlord and the Serramonte landlord. Just a few questions, Your Honor?

THE COURT: Sure.

MR. LeHANE: Is all of the evidence offered by all of

the parties now admitted into evidence? I just want to --

THE COURT: Yeah. I didn't say that? I'm sorry. It's all admitted into evidence.

MR. LeHANE: Okay. That includes the leases, the declarations, the Aronoff, the Elliott, the deposition transcript excerpts, and the declaration exhibits?

THE COURT: I meant to say that when I listed all of them.

MR. LeHANE: Yeah.

THE COURT: But apparently I forgot.

MR. LeHANE: Right.

THE COURT: But they're all admitted into evidence.

MR. LeHANE: The additional slides, the -- okay.

THE COURT: They're all in.

MR. LeHANE: Okay. Now with respect to an order, we would ask that we have time to work through an order, and we would ask for that there would be the typical time to allow the parties to as for file a notice of appeal and not that the order be enforceable immediately. We would ask to have some time to work through that with counsel for the debtor.

THE COURT: Okay. That's no problem. But I'm going to tell you right now I'm not going to say that you can't have those 14 days at least to try to come to the form of order or do whatever it is that you want to do in connection with any appeal.

I kind of said this, but maybe I didn't directly say it. This was a difficult decision for me. There was a lot of good arguments on both sides, and it required a lot of thought and a lot of consideration and a lot of reading of cases and hundred-page leases in small print. And that's the way I came out, but it's a difficult issue. And I appreciate the arguments on both sides.

And as much as I appreciate the arguments on both sides, I more appreciate the absolutely impeccable and really in many ways unprecedented professionalism, courtesy, and respect that the parties have shown for each other throughout these proceedings. I have to call them one way or another, and that means somebody wins and somebody loses.

But I appreciate that all the effort that goes into this and even more the professionalism and good faith that has been shown. For example, that the landlord said let the lease payment go for 30 days or actually 60 days. That's good faith, to me. Okay?

MR. LeHANE: Thank you very much, Your Honor.

THE COURT: Thank you.

So we'll just mark this order to be submitted. And you know our Rules, this is not going to happen, but our Rules provide that if the parties can agree, one party can submit on seven days' notice and the other party has the right to object and submit their own form of order. I think the form of order

should be pretty simple, but I haven't seen that mean simple ones in this case. I'll be waiting on it and I'll be ready to enter it when it's the appropriate time. Okay?

Thank you very much.

MULTIPLE COUNSEL: Thank you, Your Honor.

THE COURT: Much appreciated again. Have a good afternoon.

UNIDENTIFIED COUNSEL: Same to you.

UNIDENTIFIED COUNSEL: Thank you, Your Honor.

THE COURT: I'm sorry for keeping everybody late, but I'm glad we got it done today. I think it's helpful to all involved.

(Proceedings concluded at 6:29 p.m.)

* * * * *

C E R T I F I C A T I O N

We, KAREN K. WATSON AND DIPTI PATEL, court approved transcribers, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter, and to the best of our ability.

/s/ Karen K. Watson

KAREN WATSON, CET-1039

/s/ Dipti Patel

DIPTI PATEL, CET-997

J&J COURT TRANSCRIBERS, INC. DATE: September 1, 2023